

IN THE MATTER OF
***THE REAL ESTATE ACT* c.R-2.1**
AND
IN THE MATTER OF BARBARA HEISLER

DECISION OF THE DEPUTY SUPERINTENDENT OF REAL ESTATE

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

Appearances: Tom Ketterer and Ed Miller, on behalf of the Saskatchewan Real
Estate Commission
Reg Kotlar and Barbara, on behalf of Barbara Heisler

Hearing Date: September 23, 2010

Decision Date: September 7, 2011

DECISION OF THE DEPUTY SUPERINTENDENT OF REAL ESTATE

This decision addresses the appeal of the decision of the Saskatchewan Real Estate Commission in *In the Matter of Barbara Heisler*, May 11, 2010 (the “Decision”) as is allowed pursuant to section 43 of *The Real Estate Act* (the “Act”).

At the time of the Saskatchewan Real Estate Commission (the “Commission”) hearing, Ms. Heisler was registered as a salesperson with Norland Realty Ltd. O/A Sutton Group – Norland Realty.

I. Facts

For convenience, I will summarize the facts admitted to by Ms. Heisler in the Statement of Facts and Admissions, provided in the record, and accepted at appeal:

In a letter dated February 5, 2010, addressed to Marlene Williamson of the Investigation Committee at the Saskatchewan Real Estate Commission, Ms. Heisler pled guilty to one charge of professional misconduct contrary to section 39(1)(c) of the Act, but identified some concerns with the Statement of Facts and Admissions. On the bottom of that letter there is a note that appears to be in Ms. Heisler’s handwriting that confirms she would not be attending the mitigation hearing.

In the Statement of Facts and Admissions, dated February 11, 2010, Ms. Heisler again pled guilty to a charge of professional misconduct as described in 39(1)(c) of Act, for breaching section 58(1)(b)(iv) of the Act, for failing to ensure that the Residential Contract of Purchase and Sale contained clear terms and conditions.

The facts of the case are as follows:

On April 30, 2008, Ms. Heisler assisted prospective buyers to complete a Residential Contract for Purchase and Sale, which included a possession date of September 1, 2008.

On May 6, 2008, Ms. Heisler and the prospective seller’s agent assisted their respective clients to draft and execute an Amendment to the Residential Contract of Purchase and Sale (the First Amendment) which included a provision that the seller make certain repairs, but did not stipulate time for repairs to be completed.

On May 6, 2008, at the same time as the First Amendment was drafted, Ms. Heisler and the prospective seller’s agent assisted their respective clients to complete a Notice to Remove Conditions on Residential Contract of Purchase and Sale form that included the statement that “All conditions are removed when the Amendment to the Residential Contract of Purchase and Sale form is signed by the seller and repairs are reviewed by the buyers.”

On August 1, 2008, the prospective seller's agent notified Ms. Heisler that the repairs were completed, that the seller intended on moving out of the house on August 15, 2008 and that the seller would not be opposed to an agreed upon early possession date.

On August 1, 2008, the buyers were not in a position to agree to early possession.

On August 5, 2008, Ms. Heisler assisted the prospective buyers to draft an Amendment to Residential Contract of Purchase and Sale (the Second Amendment) which asked for an extension of the possession date from September 1 to October 15, 2008; proposing that the sale be subject to the sale of the purchaser's home and that "all repairs as indicated by the building inspection report must be reviewed satisfactory to the buyer".

The seller did not agree to the terms in the Second Amendment.

On August 29, 2008, the prospective seller's agent accompanied Ms. Heisler, the prospective buyers and their home inspector to review the property.

On August 31, 2008, Ms. Heisler assisted the prospective buyers to complete a form titled Notification Conditions Have Not Been Satisfied or Removed in Writing. Ms. Heisler also left a voice mail for the prospective seller's agent notifying the agent that the prospective buyers would not be purchasing the house because the required repairs were not complete.

Ms. Heisler admitted that including a completion date for the satisfactory review of the repairs ought to have been included when the provision respecting repairs was first included in the First Amendment.

II. The Commission's Decision

A Mitigation Hearing took place on April 12, 2010. The Commission accepted the Statement of Facts and Admissions wherein Ms. Heisler acknowledged the violations and heard representations as to the appropriate sanctions.

Ms. Heisler did not attend the hearing and did not contact the Commission prior to the hearing to attempt to reschedule the date.

On May 11, 2010, the Commission rendered its Decision wherein it stated:

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

- a) Barbara Heisler receive an order of reprimand for the violation of the *Act*;
- b) Barbara Heisler, prior to July 15, 2010, pay to the Saskatchewan Real Estate Commission, a \$3,500.00 fine for the said violation of the *Act*; and
- c) Barbara Heisler's registration shall be suspended if she fails to pay any portion of the fine within the said period of time;

The Commission's rationale for the order is as follows:

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

The Committee felt this was a very serious matter which required a significant sanction in order to make sure the real estate industry understands that the drafting of unclear conditions on the wrong documents leads to potentially severe problems for the buyers, the sellers, other registrants, the brokerages and themselves. The public is relying on the registrants to act in a professional manner and to protect their interests. The Commission is responsible for ensuring that the public has confidence in the regulation of the registrants and that they can rely on the registrants to take their responsibility seriously.

The lack of clarity in the documents in this matter was significant. It was not clear who does the work, was it to be done to anyone's satisfaction, who is to pay for it, or when it was to be done. There is standard wording given to all registrants for the purpose of having clarity in the conditions. In this matter, the wording should have been much clearer and there should have been no question as to the meaning of the conditions. In addition, it seems as if there was further error in the documentation as the deposit was not in possession at the time of signing of the offer and not deposited until five days after the date the offer was signed. The Committee wants to make it clear that the offer must state the facts and if the deposit has not been received, the offer should not state that it has been received.

The Committee reiterates the Ehmann decisions which stated: "The Complainant and the general public have the right to rely upon a registrant to act in a professional manner. The documentation and circumstances surrounding a trade in real estate are matters in which the general public is not cognizant as to what steps must be taken. They are relying upon the trained and educated registrant to do what is best for them." These are basic elements of the contract between the buyer and the seller. It is essential that the registrants ensure they are met. Time is always important. The wording of the documents must be clear so that anyone looking at them could tell what is meant. It is not appropriate that matters are to be assumed in reading the conditions. The memory of parties a few months later may not be clear. The wording in the document must be clear. Use of proper forms, proper language and professional responsibility is what the public is entitled to expect and what the Commission is to protect.

In the circumstances of this file, the Committee feels that the sanction in the Ehman [sic] case is appropriate to apply for Ms. Heisler. It is important that she understands the need for proper documentation and the sanction is noted for the general deterrence of all registrants. The Committee is concerned that the prior cases involving breach of this section of the Act have not been taken seriously by some of the registrants in the province and want to ensure that all registrants understand their professional responsibility toward their clients.

It is noted that Ms. Heisler did not attend the Hearing. It is always helpful to the Committee if the registrants attend and explain the situation to the members of the Committee. We would encourage registrants to attend if reasonably possible.

III. Appeal

Ms. Heisler's appeal hearing took place at the Office of the Superintendent of Real Estate on September 23, 2010. Ms. Heisler represented herself and Mr. Reginald Kotlar appeared on her behalf as well. Tom Ketterer and Ed Miller were present on behalf of the Commission.

At the hearing, Ms. Heisler explained that she was appealing the quantum of the penalty imposed by the Commission because:

1. The Commission did not establish the elements of the breach; and
2. If the Commission did establish the elements of the breach, the quantum is not consistent with previous Commission decisions, *In the Matter of Jeff Lou Howsam* 2006-65, *In the Matter of Paul Ehmann* 65-40, and *In the Matter of Ronald Ashton* 2006-70.

IV. Analysis

Issues

1. Did the Commission establish the elements required to meet the charge of professional misconduct?
 - a. What is the applicable standard of review?
 - b. Applying the applicable standard of review, did the Commission establish the elements required to meet the charge of professional misconduct?
2. If the breach was established was the quantum of penalty reasonable?

1. Did the Commission establish the elements required to meet the charge of professional misconduct?

a. What is the applicable standard of review?

The Supreme Court of Canada commented on the 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)

The question of whether the Decision establishes the elements of the breach is a question of statutory interpretation. In *Dunsmuir*, the Supreme Court determined

that “deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity” (para 54).

The Supreme Court confirmed that a contextual analysis of a number of relevant factors must be conducted to identify the proper standard of review. The factors the court identified include: 1. the purpose of the tribunal as determined by interpretation of enabling legislation; 2. the nature of the question at issue; and, 3. the expertise of the tribunal. The following paragraphs address each of these factors.

What is the Purpose of the Tribunal?

The Commission is a corporation established under *The Saskatchewan Real Estate Act* for the purpose of regulating the real estate industry in this province in the public interest. The Commission’s role includes preventative and interventionist aspects. On the preventative side, the Commission has the authority to protect consumers by ensuring and prescribing requirements for transparency in advertisements and in all matters pertaining to real estate transactions, including contractual drafting. On the disciplinary side, the Act grants the Commission disciplinary powers to ensure that registrants do not take risks that might adversely affect consumers and other registrants. To this end the Commission has the statutory authority to take enforcement measures against registrants who are found to have committed acts amounting to either professional misconduct or professional incompetence.

The Act’s provisions are designed to establish a time and cost-effective method for addressing complaints and related instances of misconduct by registrants. It provides an alternative to judicial determination in the sense that the Commission is empowered to discipline individuals and corporations that are registered under the Act.

The Nature of the Question at Issue

The nature of the question at issue is not of central importance to the legal system and nor is it outside the specialized expertise of the Commission. The question as to whether the elements of professional misconduct have been established is a question pertaining to the Act and having to do with issues of consumer protection and the public interest. Specifically, the question has to do with setting a standard for clear contractual drafting for the industry and is a matter that I find to be squarely within the expertise and responsibility of the Commission.

The decision of *Salway v. Assn. of Professional Engineers and Geoscientists* (British Columbia), 2010 BCCA 94, which has been cited with approval by Saskatchewan’s Court of Queen’s Bench in *Aboubdallah v. College of Dental Surgeons (Saskatchewan)* 2010 SKQB 256, confirms that the reasonableness standard is appropriate in addressing questions of conduct.

Salway provides a strong precedent for the proposition that reasonableness is the appropriate standard of review in assessing a disciplinary tribunal’s decision as to

professional conduct. In sum, I consider myself bound to apply the reasonableness standard of review in assessing whether the Commission established that Ms. Heisler's conduct constituted professional misconduct.

- b. Applying the applicable standard of review, did the Commission establish the elements required to meet the charge of professional misconduct?**

Was the Commission's decision reasonable?

The terms of the reasonableness analysis are summarized in *Dunsmuir* 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)

A *Dunsmuir* analysis, therefore, requires that I determine the following two questions:

- a. Was the process of articulating the reasons reasonable in that it conveyed sufficient justification, transparency and intelligibility?
b. Was the Decision's outcome reasonable in the sense that it falls within a range of possible outcomes which are defensible in respect of the facts and law?

Was the process of articulating the reasons reasonable in that it conveyed sufficient justification, transparency and intelligibility?

I am satisfied that the Commission's process of articulating its reasons was reasonable in the sense that it explained the charge and supporting evidence in a manner that conveyed sufficient justification, transparency and intelligibility.

The Decision explains that Ms. Heisler was charged with and admitted to professional misconduct when she breached clause 58(1)(b)(iv) of the Act which requires an offer to purchase obtained by a registrant to clearly show, prior to execution by the buyer, the terms and conditions of the offer. The Decision also explains how terms of the offer became unclear due to the use of inappropriate forms and a failure to lay out in writing the timing and requirements for determining when the repairs were to be completed. The Decision states:

The lack of clarity in the documents in this matter was significant. It was not clear who does the work, was it to be done to anyone's satisfaction, who is to pay for it, or when it was to be done. There is standard wording given to all registrants for the purpose of having clarity in the conditions. In this matter, the wording should have been much clearer and there should have been no question as to the meaning of the conditions.

Was the Decision's outcome reasonable in the sense that it falls within a range of possible outcomes which are defensible in respect of the facts and law?

The outcome of the Decision included a fine of \$3,500. For this reason, the question becomes, was the fine of \$3,500 reasonable in the sense that it falls within a range of possible outcomes which are defensible in respect of the facts and law?

Mr. Kotlar addressed the reasonableness of the fine when he argued at appeal that the fine ought to be overturned due to the precedents set by the Commission in previous decisions, specifically, *Howsam*, *Ehmann* and *Ashton*.

Mr. Kotlar argued that in *Howsam*, no mandatory forms were used and the registrant was fined \$2,000. He argued that failure to use forms was more egregious than the drafting oversights committed by Ms. Heisler and that, accordingly, Ms. Heisler's fine ought to be less than the fine levied in that case.

I do not agree with this argument. The issue in *Howsam* had to do with an infraction of bylaws 730(a) and 730(f), which have to do with use of mandatory forms, as opposed to drafting clear conditions which is the issue we are considering in this case. Although relative egregiousness is relevant in determining the magnitude of a fine, in this case the comparison is not helpful since the charges have to do with different infractions.

The *Ashton* decision did involve an infraction of clause 58(1)(b)(iv) of the Act. Mr. Ashton was fined \$750 for failing to specify the date that the seller was to have a condition completed. This case is more similar to the facts of this appeal, but *Ashton* did not involve the other complicating factor that took place in the Heisler's case of improper form use. In the present case the ambiguity arose due to a failure to draft clearly and the improper use of a form.

The *Ehmann* decision involved a number of serious allegations. Ultimately Mr. Ehmann received a fine of \$3,500 for breaching clause 58(1)(b)(iv) of the Act when he failed to include fundamental terms having to do with mortgage assumption and timing associated with mortgage assumption. The charge in the *Ehmann* decision is the same as the charge against Ms. Heisler and the fine is identical. I cannot find that the facts of *Ehmann* are so different from the present case as to take the present Decision outside of the range of possible outcomes which are defensible in respect of the facts and law.

In upholding this fine I would also note that property values have risen sharply between 1999 and 2011 and, accordingly, the industry has come to enjoy higher profits due to this rise. One of the factors to be considered in determining the quantum of a fine is whether the fine is sufficient to have a deterrent effect on the registrant, specifically, and also on the industry as a whole, generally. The

Commission has a mandate to deter harm to consumers and other industry participants. When you consider the potential loss a seller or buyer may suffer if terms are not clear on the offer, the need for deterrence ought to be proportionate to manage that risk. Sloppy drafting is not merely the failure to check a box or to add a stipulation as to time or manner of contractual fulfillment, it has real consequences for the people who are subject to the contractual terms that an agent prepares.

The drafting of clear terms and conditions is a fundamental responsibility of registrants and is one of the reasons that consumers rely on registrant expertise.

2. If the breach was established was the quantum of penalty reasonable?

For the reasons expressed above, I find that the quantum of penalty was reasonable.

V. Decision

Having reviewed the record, including the Commission's Decision and Ms. Heisler and Mr. Kotlar'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 the Commission's decisions on quantum and suspension to be reasonable ones that fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

For the foregoing reasons, I hereby dismiss Ms. Heisler's appeal and confirm the Commission's Decision. As the Order was stayed pending the outcome of the appeal, Ms. Heisler shall pay the fine of \$3,500 to the Commission by October 15, 2011.

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

Dated at Regina, Saskatchewan this 7 day of September, 2011.



C. E. Thompson
Deputy Superintendent of Real Estate