

IN THE MATTER OF
***THE REAL ESTATE ACT* c.R-2.1**
AND
IN THE MATTER OF REGINALD KOTLAR

DECISION OF THE DEPUTY SUPERINTENDENT OF REAL ESTATE

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

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

Hearing Date: September 23, 2010

Decision Date: September 7, 2011

DECISION OF THE DEPUTY SUPERINTENDENT OF REAL ESTATE

This decision addresses the appeal by Reginald Kotlar, in his capacity as broker, 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 Reginald Kotlar*, May 11, 2010.

Mr. Kotlar has been registered as a broker since December 1, 1994, and was registered as a broker at all times relevant to this decision.

I. Statement of Facts and Admissions and Commission Findings

Mr. Kotlar was charged with professional misconduct as described in section 39(1)(c) of the Act for failing to adequately supervise the activity of the registrant he was responsible for, contrary to bylaw 711.

The substance of the charge was that he failed to adequately supervise when he failed to adequately review and understand a specific transaction for which his brokerage represented both the prospective buyers and the seller before authorizing the return of the deposit.

Mr. Kotlar pled guilty to this charge and the following facts:

1. On April 30, 2008, a registrant from Mr. Kotlar's brokerage was authorized to market the property that is the subject of the transaction at issue.
2. Also on April 30, 2008, another registrant from Mr. Kotlar's brokerage assisted the prospective buyers to write a Residential Contract of Purchase and Sale which included the following terms:
 - purchase price of \$785,000;
 - deposit of \$10,000;
 - \$275,000 by new mortgage;
 - \$500,000 balance of cash;
 - subject to building inspection by May 10, 2008;
 - subject to buyers' approval of Property Condition Disclosure Statement by May 10, 2008; and
 - possession date of September 1, 2008.
3. The seller accepted the buyers' terms.
4. On May 5, 2008, the prospective buyers' deposit cheque was deposited into the brokerage's real estate trust account.
5. On May 6, 2008, the registrants acting for the buyers and seller prepared an Amendment to the Residential Contract of Purchase and Sale form which listed six repairs that were to be conducted upon the property by the seller and referred to the inspection report for

details. There was no completion date identified for the completion of these repairs on either form.

6. On the same day, May 6, 2008, both registrants assisted their respective clients to draft and execute a form entitled "Notice to Remove Conditions on Residential Contract of Purchase and Sale" that included the statement that "all conditions are removed when the Amendment to Residential Contract of Purchase and Sale form is signed by the seller and repairs are reviewed by the buyers".
7. On August 29, 2008, the seller's representative conducted a review of the property for the prospective buyers, their agent and the buyers' home inspector.
8. On Sunday August 31, 2008, the day before possession, the prospective buyers submitted a Notification Conditions Have Not Been Satisfied or Removed in Writing form, stating that the conditions had not been satisfied and have not been waived in writing and demanding immediate return of the \$10,000 deposit.
9. On the morning of Tuesday, September 2, 2008, (the first business day after the long weekend) the registrant representing the buyers delivered a copy of the Notification Conditions Have Not Been Satisfied or Removed in Writing to the brokerage's former conveyance officer. The conveyance officer telephoned Mr. Kotlar with the information and the request for the immediate return of the deposit.
10. On September 2, 2008, Mr. Kotlar also spoke with the registrant representing the buyers who conveyed to him that the prospective buyers had not removed conditions as the seller had not completed required repairs.
11. Mr. Kotlar authorized return of the deposit without making an effort to discuss the issue with the registrant representing the seller.
12. At no time between August 31, 2008 and September 2, 2008, did Mr. Kotlar receive notification from the registrant representing the seller that the seller intended to contest the return of the deposit.
13. A few days after releasing the deposit Mr. Kotlar received a call from the seller disputing the return of the deposit.
14. At the time of releasing the deposit Mr. Kotlar believed that he was correct in authorizing the return of the deposit.
15. Mr. Kotlar admits that in hindsight both registrants ought to have clearly identified a completion date for repairs.
16. Mr. Kotlar admits that during the times that he and his management team reviewed the file between May 6, 2008 and September 2, 2008, they failed to catch the mistakes that led to the release of the deposit.
17. In an undated document addressed to Marlene Williamson, Mr. Kotlar indicates that he would not be able to attend the mitigation hearing and states that:

One thing is missing, however, in the Statement of Facts and Admissions which I felt is pertinent to this hearing. I did review documentation prior to releasing the deposit. I noticed that there was no date for removal on the amendment and felt because the seller had signed the document that it was understood that if repairs were not made by possession that the transaction may not proceed. Unfortunately, I missed the fact that [the registrant acting for the buyers] did not write in the words subject to the buyer's [sic] satisfaction, although I felt it is implied. The review of the documentation coupled with the review of the

home inspector's report that work was not completed was why my decision was what it was. At no time prior to the release was I aware that the seller wanted to dispute this position.

II. The Commission's Decision

A Mitigation Hearing took place on April 12, 2010. The Commission's Hearing Committee accepted the Statement of Facts and Admissions wherein Mr. Kotlar acknowledged the violation and heard representations as to the appropriate sanctions.

Mr. Kotlar did not attend the mitigation hearing, nor did he notify the Commission he would not be in attendance.

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

In accordance with the *Act* and Regulations, the Committee made the following orders:

- d) Pursuant to clause 38(1)(f) of the *Act*, that Reginald Kotlar receive an order of reprimand for the violation of Bylaw 711 of the *Act*;
- e) Pursuant to subclause 38(2)(a)(i) of the *Act*, that Reginald Kotlar, prior to June 30, 2010, pay to the Saskatchewan Real Estate Commission, a \$2,500 fine for the said violation of the *Act*; and
- f) Pursuant to clause 38(2)(b) of the *Act*, that Reginald Kotlar's registration shall be suspended if he fails to pay any portion of the fine within the said period of time.

The Commission's rationale for these penalties is as follows:

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

The Hearing Committee felt that the issue is the lack of review of the matter and failure to see the potential issues that were created by the unclear manner in which the documentation was left. As the broker supervising the agents in the Brokerage, Mr. Kotlar should have a process in place to ensure that the conditions in a trade in real estate contract are clear and verifiable. It is this lack of clarity which has led to the dispute between the Seller and the Buyers.

The consequences of the lack of clarity in trades in real estate may include disputes between registrants, the public losing faith in registrants' ability to assist them in closing a transaction and legal action being required to resolve matters. This is the responsibility of the broker according to Bylaw 711, "... to adequately supervise the activities of the registrants and other personnel for whom he or she is responsible." It is apparent that this did not occur in this matter, leading to problems between the Buyers and Seller.

The Committee wants to ensure that all brokerages realize the importance of Bylaw 711. It is their duty to supervise. This may mean having systems or supervisory personnel in place to make sure it can occur. The public expects this supervision to be taking place and all registrants should be conscious that they are responsible for proper drafting of contracts and the brokerages must know that they are happening within their brokerage. The brokers can only know this if they undertake appropriate and adequate supervision of the people in the brokerage.

This is a more serious situation than the Wouters case as there was no supervision of the contract and this lack of supervision has significant ramifications to parties. The Committee feels a strong fine is required to ensure public confidence in the supervision of registrants by the Commission and to send a strong message

to all registrants that supervision by brokerages is their responsibility and it will be enforced by the Commission.

III. Appeal

Mr. Kotlar's appeal hearing took place at the office of the Superintendent of Real Estate on September 23, 2010. Mr. Kotlar and Barb Heisler were present and Mr. Kotlar spoke on his behalf. Tom Ketterer and Ed Miller were present and spoke on behalf of the Commission.

The basis for Mr. Kotlar's appeal is that the charge of failure to adequately supervise was not substantiated by the Decision.

When asked about how he supervises a transaction, Mr. Kotlar explained how he reviews a file and what he looks for as a broker:

When I get a new file the things I'm looking for are the Property Condition Disclosure Statement, Fintrac forms, Agency Disclosure forms, the Ancillary form, condition precedents on the Transaction Record sheet, signatures and initials on the contractual agreements, as well as whether these signatures were witnessed. I do this with every file and it has worked for me for 17 years without ever being brought up on charges relating to broker supervision.

Mr. Kotlar admitted that he probably should not have signed the Statement of Facts and Admissions based on the charge because, he explained, while he may have been guilty of misinterpreting a clause on an agreement and missing the fact that some wording could have been clearer, the issue was not one of supervision. He went on to say that the only reason he signed the Statement of Facts and Admissions form was because he was under the impression that a registrant is always better off signing than proceeding to a formal hearing, which would entail having to bear costs in addition to fines.

Mr. Kotlar confirmed that he did not have policies and procedures in place respecting contractual drafting requirements. He went on to explain, however, that there is an industry standard in the form of a standard clause and phrase book that all registrants in his brokerage have and can refer to. Also, registrants are able to take continuing education on the issue of drafting.

If an issue with drafting comes up at Mr. Kotlar's brokerage the process is to address it at the sales meeting.

In reference to precedent Mr. Kotlar argued that if the charge is upheld, he had reviewed the case of Kevin Wouters who received a fine of \$1,500 when one of his agents submitted 51 incorrect advertisements over a period of six weeks and suggested that misinterpreting a few words on a contract doesn't appear to have nearly the impact that an ongoing broker supervision breach would create.

Mr. Ketterer, for the Commission, argued that the supervision in question had to do with the supervision involved prior to the authorization of deposit return on the transaction.

He acknowledged that there are standard clause and phrase books which provide guidance but for adequate supervision to occur, offices ought to have policies about how to process documents, there ought to be a well laid out office policy procedure manual for what happens when transactions, documents and contracts are drafted, when they are reviewed, when issues are noted or not noted, when transactions fail to complete and what steps and actions ought to be taken by the broker to make sure that everything is done appropriately.

IV. Analysis

a. Issues

1. Was the Commission's decision on quantum reasonable?
 - i. What is the applicable standard of review?
 - ii. Was the Commission's decision on quantum reasonable?

1. **Was the Commission's decision on quantum reasonable?**

The first step in assessing whether the Commission's decision on quantum was appropriate is to determine the standard that I am required to apply to review this type of decision. Once the standard of review is established, I am required to measure the Commission's decision against that standard to determine whether it was appropriate.

i. What is the applicable standard of review?

The Supreme Court of Canada recently commented on 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 Ivan Toledo*, July 30, 2008; *In the Matter of Linda Boxall*, July 30, 2009; *In the Matter of Annette Katchan*, July 30, 2008; *In the Matter of Terry Hincks*, July 30, 2008, *In the Matter of Garry Schriml*, July 30, 2009.)

ii. **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)

Following *Dunsmuir*, my analysis will progress in two steps:

1. It will assess whether the Decision reflects sufficient justification, transparency and intelligibility to meet the test for reasonableness; and, if the first test for reasonableness is met;
2. It will assess whether the Decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Does the Decision reflect sufficient justification, transparency and intelligibility to meet the test for reasonableness?

Mr. Kotlar admitted to breaching bylaw 711. The charge to which Mr. Kotlar pled guilty was stated as follows in the Decision:

Mr. Kotlar failed to adequately review and understand the real estate transaction between two of the registrants for his brokerage where the brokerage represented both the prospective buyers and the seller before authorizing the return of the prospective buyers' deposit.

Bylaw 711 provides as follows:

711 - A broker or branch manager shall adequately supervise the activities of the registrants and other personnel for whom he or she is responsible. In determining the adequacy of the supervision, the Commission will consider the following factors, but will not be limited to making a determination on these factors alone:

- (a) whether the broker or branch manager was physically available to supervise;
- (b) whether the broker or branch manager had established written policies and procedures;
- (c) whether the broker or branch manager held regular staff meetings to determine that policies or procedures were properly implemented;
- (d) whether the broker or branch manager had undertaken all reasonable steps to ensure compliance by all salespersons and other personnel; and
- (e) whether the broker or branch manager took corrective and remedial action when a violation by a salesperson or other personnel was discovered.

After reading bylaw 711, it follows that a breach will result when a broker fails to adequately supervise the activities of registrants for whom he or she is responsible. The question I am left to answer is, does the Decision reflect sufficient justification, transparency and intelligibility to meet the test of reasonableness in establishing the breach.

The Decision suggests that the deposit dispute that arose in this case could have been avoided if Mr. Kotlar had addressed the drafting ambiguity before releasing the deposit. The Commission suggests that if Mr. Kotlar had implemented a set of written policies and procedures that were designed to ensure clear drafting of fundamental terms in a real estate contract, he would have met his responsibility to supervise adequately.

Mr. Kotlar admitted that he had no policies or procedures in place respecting clear drafting and he admitted that the contract ought to have included a completion date for the repairs.

Although he did provide an account of the process he uses when a file comes across his desk, at appeal. The described process does not involve consideration of the wording of the fundamental terms of the contract.

It is worth noting that all brokers are responsible for reviewing and initialing all real estate agreements, pursuant to bylaw 712. The scope of what a broker considers in his or her review may vary according to the experience of the individual drafting the document for review, but the fact of ensuring that there are policies and processes in place, documented and implemented, to direct this review is a different matter and it is this matter that lies at the heart of this case.

A crucial part of the real estate transaction is the negotiation and contractual documentation of the transaction. Drafting of conditions is a fundamental part of the service that registrants provide to consumers and this is why the Act and the bylaws address contractual requirements and clarity. If the terms and conditions of the contract are not clearly drafted, consumers will suffer and preventable legal disputes will arise. This harms consumers and the industry. As contractual drafting is an essential component of the service provided by registrants it follows that key terms, including times by which a condition must be met, must form a part of the review process so that the broker can be satisfied that the registrants know how to draft clear terms and that the registrants are meeting drafting requirements. This is especially the case where the brokerage is acting for both parties to the transaction, since the brokerage is responsible for the deposit in these cases.

Mr. Kotlar admitted that he did not review the conditions and that he missed the failure to stipulate the completion date when he did review the documents. He also admitted that he did not have documented policies and procedures respecting the broker's contractual review process.

I agree with the submissions of Mr. Ketterer at appeal when he explained that a contractual phrase book and training are not sufficient to meet the supervisory requirements associated with drafting. Each brokerage ought to have policies about how to process documents and there ought to be a well laid out office policy procedure manual for what happens when transactions, documents and contracts are drafted, when they are reviewed, when issues are noted or not noted, when transactions fail to complete and what steps and actions ought to be taken by the broker to make sure that everything is

done appropriately. Here I would add that there ought to be special policies in dealing with all of these issues in a dual agency situation.

In sum, I find that the Decision provides sufficient justification, transparency and intelligibility and is, therefore, reasonable. The reasonableness standard requires me to defer to the Commission on issues within its special knowledge. It is my view that the Commission has the expertise to determine questions as to the adequacy of supervision and that the Commission's finding in the Decision is consistent with other regulatory bodies' decisions on the matter of meeting supervisory responsibilities. Adequate supervision requires clear documentation of policies and processes that can be used as a measure for employees and for supervisors to ensure risks are managed appropriately within a business.

There is a significant risk associated with a failure to supervise, generally; but the failure to ensure that brokerage employees have clear direction on drafting is particularly serious because the consequence to industry and clients is so significant. As stated in the Decision's rationale,

The Consequences of the lack of clarity in trades in real estate may include disputes between registrants, the public losing faith in registrants' ability to assist them in closing a transaction and legal action being required to resolve matters.

Does the Decision fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law?

Mr. Kotlar was fined \$2,500 for failing to supervise registrants of his brokerage.

Mr. Kotlar argued that he had reviewed the Commission's decision, *In the Matter of Kevin Wouters*, 08-54A, in which the appellant received a fine of \$1,500 when one of his agents submitted 51 incorrect advertisements over a period of six weeks and suggested that misinterpreting a few words on a contract doesn't appear to have nearly the impact that an ongoing broker supervision breach would create.

I do not agree with Mr. Kotlar and view the *Wouters* case as distinguishable on the facts. The *Wouters* case involved a failure to supervise a registrant who had a history of leaving the brokerage name off of advertising. Although supervising registrants' advertising compliance is important, because it ensures that clients and potential clients know who they are, or may be, dealing with, a failure to supervise the way contracts are drafted, at least when it comes to clear drafting of fundamental terms, goes to the heart of the service that is provided to consumers by registrants.

I agree with the Decision's statement that:

The public expects this supervision to be taking place and all registrants should be conscious that they are responsible for proper drafting of contracts and the brokerages must know that they are happening within

This is a more serious situation than the Wouters case as there was no supervision of the contract and this lack of supervision has significant ramifications to parties. The Committee feels a strong fine is required to ensure public confidence in the supervision of registrants by the Commission and to send a strong message to all registrants that supervision by brokerages is their responsibility and it will be enforced by the Commission.

For these reasons I find that the Decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law. This is a serious infraction and the fine reflects the need for individual and general deterrence and demonstrates to consumers that the Commission takes the issue of supervising its registrants' drafting seriously.

V. Conclusion

In view of the foregoing, the Commission's Order that Mr. Kotlar receive an order of reprimand, pay a fine of \$2,500 is upheld.

Further, while I do not view the issue of due process to be relevant to this case, I feel that it is important to briefly address Mr. Kotlar's criticisms of the Commission's process and, specifically, the allegation that he only signed the Statement of Facts and Admissions because he was under the impression that a registrant is always better off signing than proceeding to a formal hearing which would entail having to bear costs in addition to fines.

These are unfortunate remarks and they reflect poorly on both the Commission and the registrant who makes the choice to swear to the truth of a statement, the contents of which they believe is inaccurate or false.

When the registrant signs the Statement of Facts and Admissions he or she is swearing to the truth of the contents of this document under oath and the facts in that document are to be used as all of the facts in assessing whether an order is warranted, and if so, the nature of the order. If a registrant feels pressured to swear the contents of a document are true and he or she does not agree with the factual contents or the facts are incomplete, that registrant should seek legal advice *before* choosing to swear false testimony. There are serious consequences associated with making false statements, both legally to the individual and reputationally to the individual and to the industry.

The Commission has the authority to choose the applicable charge, not the registrant, and there is a possibility that even with a hearing on the matter the Commission may find against the registrant on a charge the registrant does not agree with.

The Commission also has the authority to charge a registrant with costs of an investigation and a hearing pursuant to subsection 38(2) of the Act. The Act allows costs so that the Commission can afford to deal with serious disciplinary issues that it may not have foreseen during the

budgeting process. It is in the nature of regulatory bodies that one cannot always plan for problems that arise in the course of a year and the legislation takes this into account by allowing the Commission to charge costs for hearings. This means that a registrant who is guilty of professional misconduct or professional incompetence may be subject to costs of the investigation and the hearing, whether there is a full hearing or not. These costs are not intended to be punitive in nature, they are merely the reasonable costs associated with a hearing and must be accounted for to the registrant before the hearing.

Disciplinary charges are serious and they are often related to a legal breach. The Commission has quasi-judicial functions. If a registrant truly believes that he has been erroneously charged and still feels pressured to swear to a false statement, he or she ought to consult a lawyer about how to address the issues.

When a registrant admits to swearing false statements under duress and chooses to take no steps to address the issue prior to appeal (such steps could include consulting counsel before swearing to the truth of the statements and presenting arguments at the mitigation hearing on the issue of process) and then, raises the issue for the first time at appeal, it creates a situation where that decision maker may be left asking why the registrant waited until the appeal to deal with this issue. Although the Act gives the appellate decision maker the authority to hear new evidence, this person's jurisdiction is limited and it is only in very rare cases and unusual circumstances that new evidence can be accepted at these hearings.

In this case, Mr. Kotlar argued that he ought not to have pled to the charge because the facts did not support the charge. I have reviewed the facts and do not agree with Mr. Kotlar's argument. I find that Mr. Kotlar has suffered no prejudice by swearing the Statement of Facts and Admissions and that he corroborated the key facts required to substantiate the charge that he originally pled to in this case.

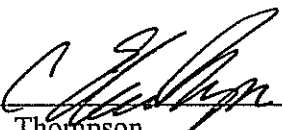
VI. Decision

Having reviewed the records, the Decision, and the representations at appeal, I find that the decision making process was reasonable in that it reflected sufficient justification, transparency and intelligibility. I also find that the decision on quantum and penalty is reasonable and falls well 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. Kotlar's appeal and confirm the Commission's Decision. As the Order was stayed pending the outcome of the appeal, Mr. Kotlar shall pay the fine of \$2,500 to the Commission by October 15, 2011.

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

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



C. E. Thompson
Deputy Superintendent of Real Estate