Citation: Claimant 3 (Re), 2022 BCSRE 34
File No. 21-1781

IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
S.B.C. 2004, c. 42 as amended (the "Act")

AND

IN THE MATTER OF

[Licencee 1]
([Licence #] – Terminated)

AND

[Brokerage 1]
([Licence #] – Terminated)

AND IN THE MATTER OF A CLAIM TO
THE REAL ESTATE SPECIAL COMPENSATION FUND BY

[Claimant 3]

[This Decision has been redacted before distribution and publication.]

1. In March 2016, [Claimant 3] (the "Applicant") reached an agreement with [Brokerage 1] ("[Brokerage 1]") which called for [Brokerage 1] to provide property management services for a property owned by the Applicant at [Property 1] in Vancouver.

2. The Applicant now brings a claim against the Real Estate Special Compensation Fund ("the Fund") with respect to losses she alleges occurred in relation to those property management services, which were provided to her by [Brokerage 1] and [Licencee 1] ("[Licencee 1]").

3. Specifically, the Applicant claims that subsequent to the former Real Estate Council of British Columbia issuing a "freeze order" on the accounts of [Brokerage 1] on February 6, 2020, the receiver appointed by the BC Supreme Court to distribute the funds held in [Brokerage 1]'s frozen accounts paid her only 84.47% of what she was owed by [Brokerage 1]. As a result, the Applicant claims, as set out in a Compensation Fund Claim Form dated May 13, 2021, that she was left with a shortfall of funds in the amount of $658.29.

Proceedings

4. On January 11, 2022, a Hearing Officer[1] determined, pursuant to section 63(1) of the *Real Estate Services Act* ("RESA"), that a hearing into whether the Applicant had experienced a compensable loss would proceed by way of written submissions.

[1] The Superintendent of Real Estate has delegated the statutory powers and duties set out in sections 61 to 67 of RESA to Hearing Officers.

5. This hearing is held pursuant to section 63(1) of the RESA, which sets out that if a claim against the Special Compensation Fund is made, the Superintendent of Real Estate must consider the claim and may conduct a hearing to determine whether the person making the claim suffered a compensable loss and, if applicable, assess the amount of that loss.

Issues

6. The issues to be determined are:

- Did the Applicant suffer a compensable loss as defined by section 60 of the RESA?
- If so, what is the amount of that loss?

Applicable Law

7. Section 60 of RESA defines "compensable loss" as follows:

> **"compensable loss"** means loss suffered by a person in relation to real estate services that is the amount of money that
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> (a)was held or received by
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> (i)a licensee,
> (ii)an officer, director, controlling shareholder or partner of the responsible brokerage,
> (iii)an employee of the licensee, of the responsible brokerage or of another related licensee of that brokerage, or
> (iv)a person acting in an independent contractor relationship with the licensee, with the responsible brokerage or with a related licensee of that brokerage,
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> from, for or on behalf of a principal in relation to real estate services, including any amount that is or is intended to be remuneration to a licensee, and
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> (b)was, as applicable,
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> (i)misappropriated or wrongfully converted by a person referred to in paragraph (a) (i) to (iv),
> (ii)intentionally not paid over or accounted for, by a person referred to in paragraph (a) (i) to (iv), to the person entitled to the money, or
> (iii)obtained by the fraud of a person referred to in paragraph (a) (i) to (iv),
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> but does not include loss that
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> (c)is claimed by a licensee or former licensee as remuneration to the licensee or former licensee,
> (d)was caused by conduct that occurred before section 61 (1) *[claim for compensation]* came into force,

(e)was caused by conduct of a licensee acting under an exemption provided by Part 9 of the rules, or
(f)is prescribed;

8. Section 61 of the Act provides that in order to make a claim for compensation from the special compensation fund, a person must apply in writing to the superintendent within the time limit established by section 61(2), which is set out as follows:

> 61(2) The time limit for making a claim is 2 years after the earliest of the following:
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> (a)the date on which the person making the claim became aware that the compensable loss occurred;
> (b)if the licence of the responsible brokerage was cancelled or suspended by an order under section 45 (2) (a) *[orders in urgent circumstances relating to licensees]* at any time after the conduct that caused the compensable loss, the date of that cancellation or suspension;
> (c)the date the superintendent publishes a notice, in accordance with the regulations, that compensable loss may have occurred.

9. Section 61(1) requires that an application must include the particulars of the conduct on which the claim of compensable loss is based, if the person is relying on a court decision, a copy of the decision, and any other information required by the superintendent.

Background

10. The information before me on this application is largely set out in the February 16, 2022 witness statement of [Auditor 1], an auditor for BCFSA, and the exhibits attached to that witness statement. Although [Claimant 3] completed a Compensation Fund Claim Form for on May 13, 2021, she has not provided any further submissions or information during this hearing process, despite being provided the opportunity to do so.

11. The following is not intended to be a recitation of all the evidence and information before me. Rather, it is intended to provide context for my reasons.

12. As noted above, the Applicant entered into a property management agreement with [Brokerage 1] in 2016. [Brokerage 1] continued to provide those services to the Applicant, which included collection of rents at the Property, until February 2020, which [Brokerage 1] and [Licencee 1]'s licenses were suspended and [Brokerage 1]'s accounts were frozen.

13. [Brokerage 1] had been licensed as a brokerage to provide trading, rental and strata property management services from May 2005 until its license was suspended in February 2020. [Licencee 1] had been licensed as the sole managing broker for [Brokerage 1], to provide trading, rental and strata property management services until his license was suspended in February 2020.

Freezing and Suspension Orders

14. On February 6, 2020 the Discipline Committee of the former Real Estate Council of BC (RECBC)[2] issued Orders in Urgent Circumstances under sections 45 and 46 of the RESA against [Brokerage 1] and [Licencee 1]. Those orders, among other things, suspended the licenses of [Licencee 1] and [Brokerage 1] pursuant to section 45 of RESA, and froze the bank accounts of [Brokerage 1] pursuant to section 46 of RESA.

15. The Discipline Committee also issued Reasons for Decision in relation to those February 6, 2020 orders. In those reasons, the Discipline Committee noted that [Licencee 1] was licensed as the sole managing broker for [Brokerage 1], as well as [Brokerage 2], and that [Licencee 1] was licensed to provide trading, rental and strata property management services at both brokerages. The Discipline Committee noted that the business of [Brokerage 1] and [Brokerage 2], as of February 6, 2020, provided only rental management services.

16. The Discipline Committee summarized the issues that brought [Brokerage 1] and [Licencee 1] to RECBC's attention at paragraph 12 of the Reasons for Decision. In summary, RECBC's audit department had conducted an inspection of [Brokerage 1]'s books and records on January 1, 2018. That inspection had identified contraventions of the Real Estate Rules, and [Licencee 1] was then required to submit monthly reconciliations for [Brokerage 1]'s pooled rental trust account for the months of December 2018 through to January 2019.

17. A review of those reconciliations identified that [Brokerage 1] had experienced shortages and overdrafts in the pooled rental trust reconciliations repeatedly during 2018. At RECBC's request, [Licencee 1] replenished trust account shortfalls that were identified in November 2018.

18. A re-inspection of [Brokerage 1] occurred on January 21, 22 and 23, 2020. That re-inspection also involved an interview with [Licencee 1]. During his interview with RECBC auditors, [Licencee 1] indicated that approximately 99% of [Brokerage 1]'s revenue was generated from property management services for approximately 180 rental units, earning fees of slightly above $20,000 per month. [Licencee 1] reported that his share of the management fees were paid from the pooled rental trust account to the general account.

19. [Auditor 2], the Senior Director, Accounting and Audit with RECBC, indicated in her February 5, 2020 affidavit that following the January 21, 22, and 23, 2020 inspection, two RECBC auditors informed her that their inspection indicated that transfers from [Brokerage 1]'s pooled rental trust account to its commission trust account and general operating account exceed [Brokerage 1]'s $20,000 per month in management fees, and that [Licencee 1] had been unable to explain that discrepancy. As a result, [Auditor 2] arranged for a further inspection of [Brokerage 1]'s books, as well as an interview with [Licencee 1], to occur on January 31, 2020.

[2] RECBC ceased to exist as of August 1, 2021, when the RECBC and the Office of the Superintendent of Real Estate were integrated into BCFSA.

20. On their review of [Brokerage 1]'s books and records on January 31, 2020, RECBC audit staff became concerned that the amount of payments from the pooled rental trust account exceeded the monthly management fees by $6,483.01 to $21,064.44 each month.

21. In her affidavit, [Auditor 2] indicated that during the January 31, 2020 interview, [Licencee 1] had acknowledged that he had transferred money from [Brokerage 1]'s pooled rental trust account to its general accounts in order to pay bills and wages because he did not have sufficient funds in the general account. [Auditor 2] noted that [Licencee 1] further acknowledged he did not know exactly how much money he owed to his clients, and that if all of [Brokerage 1]'s clients decided to leave the brokerage that day he "probably" would not have enough money to repay them, although he was not sure.

22. In a February 3, 2020 review of [Brokerage 1]'s books, RECBC auditors, including [Auditor 1], reviewed five rental properties with a view to tracking the management fees paid into the general account that were allocated to each rental property. The auditors concluded that they were not able to make such a trace, as there was no supporting documentation to support the amounts transferred from the pooled rental trust account to the general account.

23. The Discipline Committee concluded at paragraph 31 of its Reasons for Decision, that a prima facie case had been proven that [Licencee 1] and [Brokerage 1] could be culpable for professional misconduct or conduct unbecoming pursuant to section 43 of the RESA. The Discipline Committee further held that the circumstances were urgent such that orders to freeze [Brokerage 1]'s bank accounts and to suspend the licenses of both [Licencee 1] and [Brokerage 1] prior to a hearing of those matters was warranted.

Seizing of [Brokerage 1]'s Books

24. In his February 2022 witness statement, [Auditor 1] explained that on or around February 10, 2020, RECBC seized [Brokerage 1]'s Books and records pursuant to the urgent orders issued by the Discipline Committee. Subsequently, on July 17, 2020, the BC Supreme Court made an order appointing a receiver for [Brokerage 1] with a view to distributing the funds on deposit in [Brokerage 1]'s trust accounts.

25. [Auditor 1] further indicated that the status of [Brokerage 1]'s books and records required that he reconstruct a liability listing based upon the records and information obtained by the receiver over the course of the receivership. [Auditor 1] indicated that he first established a list of the relevant rental properties and owners based on the rent rolls maintained by [Brokerage 1]. [Auditor 1] indicated that those rent rolls indicated that the Applicant was the owner of the property located at [Property 1], Vancouver.

26. A Property Management Agreement between the Applicant and [Brokerage 1] was also located in the records seized from [Brokerage 1]. That agreement identified the Applicant as the owner of [Property 1].

27. On February 10, 2020, RECBC emailed the former clients of [Brokerage 1] to inform them of the suspensions of [Brokerage 1] and [Licencee 1]. On February 21, 2020, RECBC sent a further email to former [Brokerage 1] clients requesting that they provide certain information, including details

regarding the property they held which had been managed by [Brokerage 1] and the total amounts the clients considered they were owed by [Brokerage 1] as at February 6, 2020.

28. Once all of [Brokerage 1]'s clients were established, [Auditor 1] calculated the liability balances for each rental property as of February 6, 2020. He explained the manner in which he did so as follows at paragraph 14 of his February 2022 witness statement:

> …I calculated the liability balances for each rental property as of February 6, 2020 by tying the transactions (i.e. deposits and disbursements) on the bank statements to [Brokerage 1]'s bank records (for example, cheque images and deposit slips, which typically included a reference to the related property). Once these balances were established, certain adjustments were made, including:
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> a) adding outstanding balances recorded in [Brokerage 1]'s records as of December 31, 2019;
> b) deducting management fees, rent up fees, and other valid expenses incurred which had not been paid out of [Brokerage 1]'s bank account; and
> c) accounting for penalties and other miscellaneous amounts received from tenants.

29. RECBC contacted the Applicant via letter dated January 22, 2021. In that letter, RECBC advised the Applicant that RECBC had determined that a total of $4,262.50 was owing to her from [Brokerage 1] as of February 6, 2020. The January 22, 2021 letter requested that if the Applicant agreed with RECBC's assessment, that they complete the form at the bottom of the letter and return it to RECBC. The Applicant completed the bottom of the January 22, 2021 letter, indicating her agreement with RECBC's assessment on January 27, 2021.

30. On April 29, 2021, RECBC wrote to the Applicant again. In that letter RECBC advised that RECBC, in conjunction with the receiver, had determined that a total of $4,262.50 was owing to the Applicant, but that as there was a shortage of trust funds in [Brokerage 1]'s account, the receiver would only be able to distribute approximately 84.56% of the total amount assessed as owing to the Applicant, which would leave the Applicant with a shortfall of $658.29. In that April 29, 2021 letter, RECBC informed the Applicant that the amount of the shortfall may constitute a compensable loss as defined by section 60 of the RESA, and that the Applicant may wish to bring a claim against the Fund.

31. [Auditor 1] indicated in his February 2022 witness statement that in the course of RECBC's review of [Brokerage 1]'s books and records, and the reconstruction of [Brokerage 1]'s liability listing, it was determined that [Brokerage 1]'s trust accounts had a total shortage of $61,279.57. Based on that shortage, [Auditor 1] indicated that it was determined that each of [Brokerage 1]'s clients would receive only approximately 84.47% of the total amount assessed as owing to them.

32. On June 16, 2021, RECBC sent a letter to the Applicant informing them that the receiver would only be able to distribute 84.47% of the amount owing to them, rather than the 84.56% it had indicated

in its April 29, 2021 letter. RECBC enclosed a cheque made out to the applicant in the amount of $3,600.39, leaving the Applicant with a shortfall of $662.11.

Reasons and Decision

33. I am satisfied that the evidence supports a finding that that the Applicant suffered a compensable loss as defined by section 60 of the *Act*. I assess the amount of that loss to be equal to a total amount of $662.11. My reasons for having reached this conclusion follow.

34. At the outset, I note that I am satisfied that the requirements of section 61 have been met. In this case, the evidence indicates that the Applicant brought their claim well within the time limit established by section 61(2). Specifically, the Applicant completed a Compensation Fund Claim Form which was submitted to the former Real Estate Council of British Columbia on May 13, 2021. The earliest that the Applicant would have become aware that there was any potential issue with [Brokerage 1] or [Licencee 1] was February of 2020, and the notice to the Applicant that there was likely a shortfall in the [Brokerage 1] trust accounts which would create a loss to the Applicant was not provided to the Applicant until April 2021. Based on those dates, I am satisfied that the claim for compensation was brought within the two year time period established by section 61(2).

Did the Applicant suffer a compensable loss as defined by section 60 of the RESA?

35. I have summarized the circumstances that led to this application for compensation above. Having considered the evidence and information before me, which includes the witness statement of [Auditor 1] and the associated exhibits, I find that it is more likely than not that the Applicant suffered a compensable loss.

36. In reaching that conclusion, I find the evidence to show that the Applicant experienced a loss in relation to real estate services, as those services are defined in section 1 of the RESA. The definition of real estate services includes "rental property management services". "Rental property management services" is further defined in section 1 as meaning any of the following services provided to or on behalf of an owner of rental real estate:

> (a)trading services in relation to the rental of the real estate;
> (b)collecting rents or security deposits for the use of the real estate;
> (c)managing the real estate on behalf of the owner by
> (i)making payments to third parties,
> (ii)negotiating or entering into contracts,
> (iii)supervising employees or contractors hired or engaged by the owner, or
> (iv)managing landlord and tenant matters
>
> [emphasis added]

37. I find that the Applicant was receiving real estate services, in the form of rental property management services, from [Brokerage 1] and [Licencee 1].

38. The Applicant had a signed agreement with [Brokerage 1] which indicated that [Brokerage 1] would engage in rental property management services for the Property including collecting and receiving rental payment, as well as negotiating and entering into contracts with third parties for the upkeep

and improvement of the Property. The rent rolls obtained from [Brokerage 1] for the period of January 2019 through February 2020 make clear that [Brokerage 1] was collecting rents for the Property during that time period, with that money being placed into the trust account that was eventually found to have a shortfall of funds.

39. Given the above, I have no difficulty finding that [Brokerage 1], as a licensee, was holding and receiving rent money for various clients, including rental payments for the property owned by the Applicant in this claim.

40. I further find the evidence to support a conclusion that the rental monies held by [Brokerage 1] in its pooled rental trust account, including the rental monies associated with the property, were misappropriated or wrongly converted as contemplated by section 60(b).

41. In reaching this conclusion, I note in particular the affidavit evidence from [Auditor 2], which indicates that [Licencee 1] informed her that he was in fact removing money from the pooled rental trust account in order to pay [Brokerage 1]'s bills and wages. Given that information, as well as the fact that funds that were held in the pooled rental trust account were insufficient to meet [Brokerage 1]'s trust liabilities, with a total trust shortage of $61,279.57, I consider it to be clear that the evidence supports a conclusion that the Applicant's money, which was held in the pooled rental trust account by [Brokerage 1], was misappropriated or wrongly converted by [Brokerage 1] and [Licencee 1].

42. I do not consider that any of the exclusions to compensable loss set out in sections 60(c) through 60(f) have application in this case.

What is the amount of the compensable loss?

43. Having concluded that the Applicant suffered a compensable loss, section 63(1)(a) requires that I assess the amount of that loss.

44. The evidence before me indicates that RECBC auditors determined that [Brokerage 1] owed the Applicant $4,262.50 in rental funds at the time the suspension and freezing orders were issued on February 6, 2020. Due to the trust shortfall, the Applicant was paid only $3,600.39 by the receiver.

45. Given those facts, I assess the amount of the Applicant's compensable loss to be $662.11.

46. In reaching that conclusion I acknowledge that on her claim form, the Applicant indicated a claimed loss of only $658.29. I find that claimed figure to have been based on the information the Applicant had at the time of filing her claim, which was that the amount that the receiver would likely be able to pay out to her, $3,604.21, as set out in RECBC's April 29, 2021 letter. As set out above, the claimant was actually paid out $3,600.39 by the receiver.

47. In my view, the role of the superintendent as set out in section 63(1) of the RESA is clear. In the event that the superintendent determines that a compensable loss exists, the superintendent must assess the amount of that compensable loss. Although that assessment can be informed by the amount claimed, the decision as to the amount of the loss lies with the superintendent. The fact that a claimant may, in making a claim for compensation, be in error as to the actual amount of the

loss they have experienced, does not affect the superintendent's role in making the assessment of the amount of a compensable loss.

Conclusion

48. I find that the Applicant experienced a compensable loss as contemplated by section 60 of the RESA.

49. I assess the amount of that loss as $662.11. A certificate specifying the amount of the compensable loss will be issued.

Dated this 2nd day of December, 2022, at the City of Kelowna, British Columbia

"ANDREW PENDRAY"

_____

Andrew Pendray
Hearing Officer

File No. 21-1781

IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
S.B.C. 2004, c. 42 as amended (the "Act")

AND

IN THE MATTER OF

[Licencee 1]
([Licence #] – Terminated)

AND

[Brokerage 1]
([Licence #] – Terminated)

AND IN THE MATTER OF A CLAIM TO
THE REAL ESTATE SPECIAL COMPENSATION FUND BY

[Claimant 3]

CERTIFICATE OF COMPENSABLE LOSS

[This Certificate has been redacted before publication.]

In the matter of a claim for compensation to the Real Estate Special Compensation Fund by [Claimant 3] pursuant to section 63(1)(a) of the *Real Estate Services Act*, the Superintendent, on December 1, 2022:

a. determined that [Claimant 3] suffered a compensable loss; and
b. assessed the amount of the compensable loss in the amount of $662.11.

This Certificate is issued by the Superintendent pursuant to section 64 of the *Real Estate Services Act.*

Dated this 2nd day of December, 2022, at the City of Kelowna, British Columbia

"ANDREW PENDRAY"
_____
Andrew Pendray
Hearing Officer

IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
S.B.C. 2004, c. 42 as amended (the "Act")

AND

IN THE MATTER OF

[Licencee]
(Licence # - Terminated)

AND
[Brokerage]
(Licence # - Terminated)

AND IN THE MATTER OF A CLAIM TO
THE REAL ESTATE SPECIAL COMPENSATION FUND
BY

[Claimant 3]

SECTION 63(1) DECISION

After having reviewed the Claimant's claim and evidence in support and after having reviewed the response materials provided by the licensee(s), the Committee makes the following determination pursuant to section 63(1) of the *Real Estate Services Act*:

- ✓ To conduct a hearing to determine whether the Claimant suffered a compensable loss and, if applicable, assess the amount of that loss,

- ❑ To decline to make such a determination or assessment, or both, on the basis that the Committee considers the matter would more effectively be dealt with by a court proceeding,

- ❑ To postpone conducting a hearing pending the conclusion of a discipline hearing or court proceeding.

Dated this 11 day of January, 2022, at the City of Kelowna, British Columbia

"ANDREW PENDRAY"

Andrew Pendray
Chief Hearing Officer