

Citation: Jacobson (Re), 2023 BCSRE 15

Date: 2023-05-05

File No. INC-3989

**IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
SBC 2004, c 42 as amended**

**AND IN THE MATTER OF
MARY-JEAN (MJ) JACOBSON
151864**

AND

**PACE REALTY CORPORATION
X014957**

DECISION ON LIABILITY AND SANCTION

[This Decision has been redacted before publication.]

Date of Hearing: April 20, 2023

Counsel for BCFSA: Gareth Reeves

Licensees: Self-Represented

Hearing Officer: Andrew Pendray

Introduction

1. On January 11, 2023, the B.C. Financial Services Authority (BCFSA) issued a Notice of Discipline Hearing which alleged that Pace Realty Corporation (the “Brokerage”) had committed professional misconduct within the meaning of section 35(1)(a) of the *Real Estate Services Act* (RESA) when it breached section 75 of the *Real Estate Services Rules* (Rules), by failing to make the annual filings required by that section.
2. The January 11, 2023 Notice of Discipline Hearing further alleged that the managing broker of the Brokerage, Mary Jean (MJ) Jacobson (Ms. Jacobson) had also committed professional misconduct within the meaning of section 35(1)(a) of RESA by failing to ensure the Brokerage complied with the filing requirements of section 75 of the Rules.
3. A hearing into the allegations set out in the Notice of Discipline Hearing was held pursuant to section 42 of RESA. BCFSA was represented by staff legal counsel. Ms. Jacobson and the Brokerage (collectively the “respondents”) were self-represented.
4. At the hearing, counsel for BCFSA took the position that the allegations in the Notice of Discipline Hearing had been made out, and sought a number of orders pursuant to sections 43 and 44 of RESA, as follows:
 - Ms. Jacobson’s managing broker licence be immediately cancelled, and that Ms. Jacobson be permitted to continue being licensed as an associate broker or representative;
 - Ms. Jacobson be required to complete the Broker’s Licensing Course offered by the Real Estate Division of the UBC Sauder School of Business prior to applying to requalify as a managing broker;
 - That the Brokerage’s licence be immediately cancelled if it does not file its review engagement financial statement, accountant’s report, and brokerage activity report for the year ended December 31, 2021 within ninety (90) days of the date of the decision in this matter; and
 - That Ms. Jacobson and the Brokerage pay enforcement expenses recoverable pursuant to section 4.4 of the *Real Estate Services Regulation* (the Regulation).
5. Ms. Jacobson took the position that she had done the best she could to ensure that the Brokerage met the requirements of section 75 of the Rules, that she had

intended to be compliant with the Rules, and that the cancellation of her managing broker license was unnecessary in the circumstances.

The Notice of Discipline Hearing

6. The Notice of Discipline Hearing alleges that:
 1. Pace Realty Corporation (the “Brokerage”) committed professional misconduct within the meaning of section 35(1)(a) of RESA by breaching the Rules, s 75 when it failed to file its required review engagement financial statement, accountant’s report and brokerage activity report for the year ended December 31, 2021, by April 30, 2022; and
 2. Mary-Jean (MJ) Jacobson, while the managing broker of the Brokerage, committed professional misconduct within the meaning of section 35(1)(a) of RESA by breaching the RESA, s 6(2)(b) and Rules, s 28(1)(a) and (b) when she failed to ensure the Brokerage complied with the Rules in contravening the Rules, s 75 as alleged at paragraph 1.

Jurisdiction and Procedure

7. Pursuant to section 2.1(3) of RESA the Superintendent of Real Estate (the “Superintendent”) may delegate any of its powers. The Chief Hearing Officer and Hearing Officers of the Hearings Department of BCFSA have been delegated the statutory powers and duties of the Superintendent of Real Estate with respect to sections 42 through 53 of RESA.
8. Although the liability and sanction portions of decisions are generally held separately, in this case counsel for BCFSA informed Ms. Jacobson prior to the hearing that counsel for BCFSA intended to proceed on both liability and sanctions at the scheduled hearing. Ms. Jacobson acknowledged at the hearing of this matter that she did not object to this process. As a result, this matter proceeded on both the issues of liability and sanction.
9. BCFSA must prove its case on the balance of probabilities, that is, it must prove that it is more likely than not that the facts as alleged occurred. In order to make a finding against the respondents, I must find that the evidence is “sufficiently clear, convincing and cogent” to satisfy that test: *FH v McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41.

10. Evidence is generally considered as a matter of procedure¹. As an administrative tribunal the Superintendent is not bound by court rules of evidence, and in the absence of any statutory provision to the contrary, may consider any evidence it considers relevant, including hearsay evidence: *Adams v. British Columbia (Superintendent of Motor Vehicles)*, 2019 BCCA 225 (CanLII).
11. Further, the fact that the legislation may provide for a formal structure for enforcement proceedings does not preclude hearsay evidence from being admitted at a hearing². There is no provision in RESA which imports civil or criminal rules of evidence into the administrative proceedings held by the Superintendent. The Superintendent may, however, draw upon principles underlying court rules of evidence to exclude or assess evidence.
12. The Superintendent must also afford procedural fairness to a respondent where a decision may affect his or her rights, privileges or interests. This right includes a right to be heard. The Superintendent affords every respondent an opportunity to respond to the case against him or her by providing advance notice of the issues and the evidence, and an opportunity to present evidence and argument. The Superintendent must determine facts, and decide issues set out in the Notice of Discipline Hearing, based on evidence. The Superintendent may, however, apply its individual expertise and judgment to how it evaluates or assesses evidence.

Issues

13. The issues in respect of liability are:
 - Did the Brokerage commit professional misconduct within the meaning of section 35(1)(a) of RESA by failing to file its review engagement financial statement, accountant's report and brokerage activity report for the year ended December 31, 2021 as required by section 75 of the Rules?
 - Did Ms. Jacobson commit professional misconduct within the meaning of section 35(1)(a) of RESA by failing to ensure the Brokerage complied with section 75 of the Rules in respect of the fiscal year ended December 31, 2021?
14. The issue in respect of sanction is, if the Brokerage and/or Ms. Jacobson are found to have committed professional misconduct, what are the appropriate sanctions for that conduct?

¹ *Cambie Hotel (Nanaimo) Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2006 BCCA 119, para. 38.

² *Cambie Hotel*, paragraph 38.

Applicable Law

15. Section 35(1)(a) of RESA sets out that a licensee commits professional misconduct if the licensee contravenes RESA, the Regulations, or the Rules.
16. Section 6(2)(b) of RESA sets out that a managing broker licensed in relation to a brokerage acts for the brokerage for all purposes under RESA, and is responsible for the performance of the duties imposed on the brokerage by its licence.
17. Section 28 of the Rules provides that a managing broker must be actively engaged in the management of the managing broker's related brokerage, and must ensure that the business of the brokerage is carried out competently and in accordance with the Act, the Regulations and the Rules.
18. Section 75(1) of the Rules sets out that a brokerage must, within 120 days after the end of each fiscal year of the brokerage, file with the Superintendent:
 - (a) Financial statements for that fiscal year;
 - (b) An accountant's report respecting that fiscal year, completed in accordance with any requirements specified by the Superintendent, and
 - (c) A brokerage activity report respecting that fiscal year, completed in accordance with any requirements specified by the Superintendent.
19. Section 75(2) further provides that the financial statements referred to in section 75(1) must be audited by an accountant in the case of a brokerage that is a public company, or, in any other case, have been subject at a minimum to a review engagement by an accountant, unless the Superintendent has authorized a brokerage to file financial statements that have been subject to a notice to reader.

Background and Evidence

20. The evidence in the hearing consisted of two Books of Documents; the evidence provided by three witnesses called by BCFSA: [Auditor 1], [Auditor 2], and [Paralegal 1]; as well as the evidence given by Ms. Jacobson.
21. While I have reviewed and considered all of the evidence and information before me, the following is not intended to be a recitation of that evidence. Rather, it is intended to provide context for my reasons.

Licensing History

22. A February 22, 2023 section 127 certificate³ prepared by [Individual 1], Manager, Licensing, at BCFSA, indicates that Ms. Jacobson has been licensed under RESA since June 2007, and that she has been a managing broker since 2009.
23. That February 22, 2023 section 127 certificate further sets out that Ms. Jacobson has been the managing broker at the Brokerage since August 1, 2018.
24. BCFSA also produced a section 127 certificate, also dated February 22, 2023, in respect of the Brokerage. That certificate sets out that the Brokerage first became licensed in 1985 and that, other than an unlicensed period in 2002 and 2003, it had continued to be licensed since that time.

Section 75 Reports

25. [Auditor 1] is an audit specialist at BCFSA. She testified as to the nature of requirements pursuant to section 75 of the Rules for a Brokerage to file financial statements subject to a review engagement by an accountant, an accountant's report respecting the fiscal year, and a brokerage activity report respecting the fiscal year (collectively the "Section 75 Reports"). [Auditor 1] noted that the Section 75 Reports were to be signed by the managing broker of a brokerage and the accountant who had completed the review.
26. [Auditor 1] indicated that BCFSA relied on those Section 75 Reports to engage in a risk-based analysis of brokerages, and to identify any issues or concerns BCFSA may have with a brokerage's financial health.
27. [Auditor 1] testified that the fiscal year end for the Brokerage in 2021 was December 31, 2021; which meant that the Section 75 Reports were due on April 30, 2022.
28. [Auditor 1] was taken to a January 7, 2022 email sent from BCFSA Real Estate Audit, with the subject line "Accountant's Report Filing Notice – December 2021". The body of that email set out a reminder that the "Accountant's Report filing is due within 120 days of your brokerage's fiscal year end". [Auditor 1] explained that this was a generic email which would have been sent out to all brokerages who had fiscal year ends of December 31, 2021. [Auditor 1] indicated that, to her knowledge, that email was sent to Ms. Jacobson.

³ Section 127 of RESA sets out that "A statement as to the existence, nonexistence or status of a licence under this Act purporting to be certified by the superintendent is proof, in the absence of the evidence to the contrary, of the fact so certified, without proof of the signature or official position of the superintendent."

BCFSA Dealings with the Brokerage in 2022

29. [Auditor 2], a senior auditor with BCFSA, indicated that she was assigned to conduct an audit of the Brokerage in 2022. In association with that audit, [Auditor 2] and Ms. Jacobson engaged in regular email correspondence in January, February, and March of 2022. Those emails largely concerned the documents that [Auditor 2] had requested from the Brokerage.
30. In an April 14, 2022 email, Ms. Jacobson indicated to [Auditor 2] that:
 - The Brokerage’s previous financial manager had “dropped the ball on our annual audit so we are now behind”;
 - She was not ignoring [Auditor 2]’s requests for documents, but she simply had no extra time; and
 - She was prioritizing the needs of clients, and that she would then “get to things like audits, billing, etc.”.
31. [Auditor 1] stated that the Brokerage did not file its Section 75 Reports by April 30, 2022.
32. [Auditor 1] indicated that as a result of that missed filing, she had written to the Brokerage and Ms. Jacobson, at Ms. Jacobson’s email address, on May 16, 2022. In her May 16, 2022 letter [Auditor 1] noted that the Section 75 Reports had not been received by BCFSA by April 30, 2022. That letter indicated that:

As a result of the failure to file the required documents, you, as the managing broker and your brokerage are in contravention of sections 28(3)(4) and 75 of the Rules, respectively. Section 57(1) of the *Real Estate Services Act* (“RESA”) authorizes BCFSA to impose Administrative Penalties against licensees for contraventions of designated Rules, as outlined in section 26 of the Rules.

...

In addition to imposing an Administrative Penalty against the brokerage, an Administrative Penalty may also be imposed against the managing broker(s) for contravention of sections 28(1) and 75 of the Rules. You may also be found in contravention of section 21 of the Rules, which requires that a “licensee must respond promptly to any inquiry addressed to the licensee by the superintendent”.

33. The May 16, 2022 letter further indicated that BCFSA required the Brokerage to provide completed Section 75 Reports by May 31, 2022, and that:

Should you fail to provide the required document(s) in a form acceptable to BCFSA by the above-noted deadline, this matter may be subject to further discipline against you, as the managing broker and the brokerage. That would expose you to significantly greater penalties, to a maximum of \$500,000 under RESA in respect of the brokerage.

If you anticipate that you will be unable to file a complete Accountant's Report Filing by the above-noted deadline, you must contact me immediately to provide particulars of why that is so.

If BCFSA proceeds with discipline against you, orders that may be made by the discipline committee after a hearing are set out in section 43 of the RESA and include, among other things, reprimands, suspensions, the imposition of restrictions or conditions on a licence, monetary discipline penalties, and cancellation of a licence. Conduct beyond September 2016 is subject to significantly increased monetary discipline penalties as set out in the current section 43 (2) (i) of the RESA.

34. During this time, [Auditor 2] continued to correspond with Ms. Jacobson regarding outstanding documents requested in respect of [Auditor 2]'s audit of the brokerage. In a June 8, 2022 email Ms. Jacobson indicated that she continued to work on the list of documents requested by [Auditor 2]. Ms. Jacobson noted that she "still" did not have a finance manager, although she had been able to hire an accounting clerk. Ms. Jacobson noted that she was going to:

...get the most urgent client tasks done first and then get your requests handled. I apologize for the delay. It has never been my intention to deliberately delay.

35. [Auditor 2] stated that she completed her audit report and met with Ms. Jacobson to review it on June 30, 2022. [Auditor 2] explained that her audit report found a number of issues with the Brokerage, including several apparent trust shortages. [Auditor 2] explained that although her audit report did not discuss the Section 75 Report filings, her findings regarding apparent trust shortages would have had an impact on the Brokerage's ability to complete those Section 75 Report filings.
36. [Auditor 2] further explained that the managing broker of the Brokerage would be expected to investigate the items listed in her audit report, and specifically that Ms. Jacobson would have been expected to investigate whether the apparent trust

shortages were true shortages or bookkeeping errors. In summary, [Auditor 2] explained that reconciliations were required of the Brokerage. [Auditor 2] noted that, in a July 13, 2022 letter, she had provided a deadline to Ms. Jacobson and the Brokerage of July 29, 2022 to provide that reconciliation information.

37. In an August 2, 2022 email, Ms. Jacobson wrote to [Auditor 2] and indicated that she had an infected tooth, but that she would provide her audit response “in a day or two”. [Auditor 2] stated that she did not receive such a response.
38. In an August 8, 2022 email, Ms. Jacobson again wrote to [Auditor 2], and indicated that her email accounts had been down for three days, and the Brokerage server had been down intermittently during the month of July. Ms. Jacobson further indicated that the Brokerage’s accounting staff was “too new to be much help”. Ms. Jacobson repeated that she was aware of the rules and her obligations, but that she was simply having difficulty hiring new accounting staff. The email concluded with Ms. Jacobson indicating that she would have “a proper response and information to you not later than end of business August 19, 2022”.
39. [Auditor 2] testified that she next received a voicemail from Ms. Jacobson on August 17, 2022. A transcription of that email was sent to [Auditor 2]’s email, which [Auditor 2] described as roughly accurate. In that voicemail Ms. Jacobson indicated that she had asked [Accountant 1]⁴ to assist her in providing the documents requested by [Auditor 2] as well as complete the Brokerage’s annual audit⁵ as soon as possible.
40. On August 22, 2022, [Auditor 2] emailed Ms. Jacobson, and enclosed a letter from BCFSA legal counsel. That letter, also dated August 22, 2022, set out that:

This letter is a Non-Compliance Warning Letter from the BC Financial Services Authority (“**BCFSA**”). You are contravening one or more rules designated as subject to administrative penalties (“**Designated Rules**”) under section 56(1)(a) of the *Real Estates Services Act* (“**RESA**”) and sections 26 and 27 of the *Real Estate Services Rules* (the “**Rules**”).

41. The August 22, 2022 letter indicated that BCFSA required that the Brokerage comply with the audit requests by September 9, 2022.
42. On September 7, 2022 Ms. Jacobson wrote to the general BCFSA Audit email address, and indicated that the Brokerage had experienced “further turnover in accounting” and was “very short staffed”. Ms. Jacobson attached to that email a

⁴ [Accountant 1] ([Accountant 1]) is an accounting firm hired by the Brokerage.

⁵ I take this to be a reference to the section 75 filings.

September 6, 2022 letter to BCFSA in which she indicated that she and the Brokerage were not able to meet the September 9, 2022 deadline. She explained that the Brokerage remained understaffed, although she was trying. Ms. Jacobson wrote that:

I have reached out to our new outside accounting firm [Accountant 1] ([Accountant 1]) and asked them to support us in auditing our records. They have been hired to do our annual review engagement for 2021 fiscal. They cannot start because many of the errors go back to 2021. You're probably thinking, hey you're the Managing Broker, you should be noticing these things. You are correct, however some of those duties were assigned to another licensee to assist me, who has since left the industry.

....

In speaking with my new accounting person and [Accountant 1], we believe that with their support we should be able to get caught up no later than October 15, 2022. I will have 2 people dedicated to just this for the next month. Once we complete the audit requirements, [Accountant1] will begin our Review Engagement.

43. On October 12, 2022, [Individual 2], a partner at [Accountant 1], issued a letter in which she indicated that the firm had been engaged to assist the Brokerage with its December 31, 2021 year end accounting records.
44. On October 13, 2022, Ms. Jacobson emailed the BCFSA audit department. In that email she indicated that she was in the process of uploading the documents that had been requested in respect of the June 2022 audit completed by [Auditor 2]. Of note, in that email Ms. Jacobson indicated that:

We are currently re-reconciled to May of 2022...

...

Our external accountant will begin our review engagement as soon as we complete uploading the audit items for you.

45. [Auditor 2] testified that, despite Ms. Jacobson's email of October 13, 2022, all of the documents in response of the audit were not uploaded by the Brokerage on that date. Rather, [Auditor 2] testified that the required reconciliation information was not received in full until November 21 and 22, 2022.

46. [Auditor 2] further stated that, in her opinion, with all of the required reconciliation having been provided to BCFSA by November 22, 2022, the Brokerage's external accountant at [Accountant 1] would have been able to complete the Section 75 Reports. Specifically, [Auditor 2] noted that given that reconciliations were, according to Ms. Jacobson, completed through May of 2022 by October 13, 2022, that process could have been started at that point in time.
47. [Auditor 2] testified that, to her knowledge, the Brokerage had still not filed its Section 75 Reports by the date of the hearing of this matter.
48. [Auditor 1] also indicated that, to her knowledge, the Brokerage had still not filed its Section 75 Reports as of the date of the hearing of this matter. Of interest, [Auditor 1] noted that the Brokerage had in fact been late in filing its 2019 and 2020 Section 75 Reports. She noted, however, that extensions had been granted for those years for all brokerages, due to the impacts of the pandemic.

December 2022 to January 2023

49. In a December 19, 2022 letter to Ms. Jacobson, BCFSA informed her that if the Section 75 Report filings had not been received by January 6, 2023, BCFSA would seek to issue a Notice of Disciplinary Hearing against the Brokerage and Ms. Jacobson.
50. Ms. Jacobson replied by email on December 23, 2022. In that email she indicated that she was away until January 6, 2023, and that she would not be able to address the December 19, 2022 letter until her return. She further noted that her external accountant, [Accountant 1], was closed until the new year, and that she was simply unable to comply with the deadline set out in the December 19, 2022 letter.
51. On January 11, 2023 Ms. Jacobson again emailed BCFSA. In that email she indicated that she had three senior people leave the Brokerage in December. Ms. Jacobson noted that she had spoken to her accounting firm, [Accountant 1], and that she had been advised that they were not able to meet the deadline set by BCFSA, and that she was waiting to hear from the accounting firm as to when the Section 75 Report filings would be available.
52. On January 13, 2023 BCFSA again wrote to Ms. Jacobson, indicating that:

The Superintendent of Real Estate has decided to proceed with a Notice of Discipline Hearing against you and Pace Realty Corporation for the failure to file the financial year end December 31, 2021 financial statements by April 30, 2022. Please provide your availability for a one-day hearing between February 27 and

March 1, 2023 inclusive. If you do not provide that availability by January 20, 2023, a hearing date will be set unilaterally.

Please note that many disciplinary hearings before BCFSA proceed first with a hearing to determine whether a contravention has occurred and then with written submissions to determine sanction on the basis of the determinations on contravention. Given the simplicity of the contravention, a failure to make the required filings under the *Real Estates Services Rules*, s 75, BCFSA plans to proceed with a joint liability and sanction hearing.

53. A paralegal for BCFSA, [Paralegal 1], testified at the hearing that she had sent the January 13, 2023 letter to Ms. Jacobson via email, and that she did not recall receiving any correspondence from Ms. Jacobson referencing section 75 filings after that date.

Jacobson Testimony

54. Ms. Jacobson testified that she was well aware of her responsibilities under RESA, the Regulations and the Rules. She noted that she had not had any previous discipline issues. She explained, however, that in general terms, she would not know that the Section 75 Reports were going to be late until they in fact were.
55. With respect to the delay in filing the Section 75 Reports, Ms. Jacobson stated that the difficulties began when the Brokerage lost its accounting and finance manager in the summer of 2020. She noted the Brokerage had incurred significant staffing turnover since the pandemic. Ms. Jacobson further noted that she had experienced a family illness for a period of four months in 2021, and that had also affected her ability to keep on top of things at the office.
56. Ms. Jacobson indicated that she had hired [Accountant 1] in October 2022. She explained that she had not hired an accountant prior to that date due to the fact that one of the outcomes of the BCFSA audit completed by [Auditor 2] had shown shortages. Ms. Jacobson explained that as soon as the Brokerage had the reconciliations completed she had hired [Accountant 1]. When it was put to Ms. Jacobson that she had in fact hired [Accountant 1] in April 2022, she agreed that she likely had.
57. Ms. Jacobson further explained that she had been surprised by the fact that [Accountant 1] did not appear to have an understanding of what was required to complete the audits on the Brokerage's strata property management accounts. She indicated that she had come to realize [Accountant 1]'s lack of experience and knowledge in this regard in the fall of 2022, and that she then had to explain various requirements to [Accountant 1] at that time.

58. Ms. Jacobson noted that prior to hiring [Accountant 1], another accounting firm had been engaged by the Brokerage to complete the Section 75 Reports for the previous 10 years. Ms. Jacobson noted that that accounting firm had been late in providing the Section 75 Reports for 2019 and 2020, and that she had been frustrated by those results. As a result, she had sought a new accounting firm.
59. Ms. Jacobson testified that the 2021 Section 75 Reports were, to her understanding, hours or days away from being completed, and that she expected that the 2022 Section 75 Reports would follow shortly thereafter.
60. Ms. Jacobson noted that she was not denying that she and the Brokerage were late in providing the Section 75 Reports. She stated that she had additionally, in 2021, been losing business and that she had been left with a choice as to whether she would focus on completing the Section 75 Reports and complying with the audit or put her clients first. Ms. Jacobson testified that she had determined to put her clients first.

Reasons and Findings on Liability

Did the Brokerage commit professional misconduct within the meaning of section 35(1)(a) of RESA by failing to file its review engagement financial statement, accountant's report and brokerage activity report for the year ended December 31, 2021 as required by section 75 of the Rules?

61. The evidence before me makes clear that the Brokerage's fiscal year end for 2021 was December 31, 2021. That fact means that, in order to have complied with section 75 of the Rules, the Brokerage's filings as required by section 75(1) of the Rules were due on April 30, 2022.
62. I find that the Brokerage did not make its section 75 filings by April 30, 2022. I further find that, in fact, the Brokerage had still not, by the date of the hearing of this matter on April 20, 2023, nearly one year after the filing due date for the 2021 fiscal year, made its section 75 filings for that fiscal year.
63. I note, in making this finding, that neither the Brokerage nor Ms. Jacobson disputed that the 2021 Section 75 Report filings had still not been completed by the date of the hearing of this matter on April 20, 2023. Rather, Ms. Jacobson admitted as much.
64. Section 35(1)(a) of RESA sets out that a licensee commits professional misconduct if the licensee contravenes the Rules. In this case, it is clear that the Brokerage, a licensee under RESA, has contravened section 75 of the Rules by failing to file the required accountant's reports. Given that contravention, I find that the Brokerage committed professional misconduct.

65. I acknowledge, in making that finding, that in her evidence Ms. Jacobson did reference a number of issues related to staffing issues at the Brokerage, as well as personal, family and health issues, and that she described those issues as having created difficulty in filing the Section 75 Reports in a timely manner.
66. While I am sympathetic to the circumstances described by Ms. Jacobson, I note that she did not make a specific argument that she had exercised due diligence in attempting to ensure the filing of the Section 75 Reports.
67. Even if Ms. Jacobson had made such an argument, I do not consider that I would have found it to be compelling.
68. In reaching this conclusion, I note that Ms. Jacobson's evidence was that she had determined, after the previous accounting firm had been late in the section 75 filings for 2019 and 2020, that she would hire a new accounting firm. However, her evidence was also that she had not hired [Accountant 1] until April 2022. Surely, if Ms. Jacobson had been exercising due diligence with a view to ensuring the section 75 filings, a new accounting firm would have been hired well in advance of the April 30, 2022 deadline.
69. I note further that in her various correspondence to BCFSA, Ms. Jacobson specifically indicated that she was prioritizing client needs over the requirement to comply with the audit and Section 75 Report requirements.
70. Again, while I am sympathetic to Ms. Jacobson's desire to provide quality service to the clients of the Brokerage, I do not consider that Ms. Jacobson would be able to put forth a compelling argument of due diligence in respect of the Brokerage's regulatory obligations, where the facts indicate that she was specifically placing the requirement that the Brokerage comply with the Rules at a lower priority.

Did Ms. Jacobson commit professional misconduct within the meaning of section 35(1)(a) of RESA by failing to ensure the Brokerage complied with section 75 of the Rules in respect of the fiscal year ended December 31, 2021?

71. As set out above, I find that the Brokerage contravened section 75 of the Rules when it failed to make its required filings by April 30, 2022.
72. Section 6(2)(b) of RESA sets out that a managing broker, which in this case is Ms. Jacobson, is responsible for the performance of the duties imposed on the brokerage by its licence.

73. Further, section 28(1)(b) of the Rules sets out that a managing broker must ensure that the business of the brokerage is carried out competently and in accordance with the Act, the Regulations and the Rules.
74. I consider the combined effect of section 6(2)(b) of RESA and section 28(1)(b) of the Rules is to make the managing broker responsible for ensuring that a brokerage is complying with its duties under RESA and the Rules.
75. In summary, Ms. Jacobson was responsible for ensuring that the Brokerage filed its 2021 accountant's report, as required by section 75 of the Rules, by April 30, 2022.
76. The evidence is that Ms. Jacobson did not do so. Given that the filing was her responsibility as managing broker, I find that she, like the Brokerage, committed professional misconduct. Simply put, Ms. Jacobson, as a managing broker licensee, was required to ensure that the Brokerage complied with section 75 of the Rules. She did not do so, and in fact she permitted the Brokerage to contravene section 75 of the Rules.
77. I find Ms. Jacobson's actions in that regard to constitute professional misconduct, as defined by section 35(1)(a) of RESA. As set out above, I do not consider the evidence to support a conclusion that Ms. Jacobson exercised due diligence in complying with her regulatory obligations.

Reasons and Findings on Penalty

78. Given that I have found that both Ms. Jacobson and the Brokerage committed professional misconduct in respect of the failure to file the Section 75 Reports, I turn to a consideration of the appropriate sanction for that misconduct.
79. In general terms, the issuing of sanctions in relation to breaches of RESA is done with an overarching goal of protecting the public.
80. Sanctions serve multiple purposes, including:
 - denouncing misconduct, and the harms caused by misconduct;
 - preventing future misconduct by rehabilitating specific respondents through corrective measures;
 - preventing and discouraging future misconduct by specific respondents through punitive measures (i.e. specific deterrence);
 - preventing and discouraging future misconduct by other respondents (i.e. general deterrence);

- educating licensees and the public about rules and standards; and
- maintaining public confidence in the real estate industry.

81. Administrative tribunals generally consider a variety of mitigating and aggravating factors in determining sanctions, largely based on factors which have been set out in cases such as *Law Society of British Columbia v. Ogilvie*, 1999 LSBC 17, and *Law Society of British Columbia v. Dent*, 2016 LSBC 5. Those mitigating and aggravating factors may include the following:

- the respondent's experience;
- the respondent's discipline history;
- the nature and gravity of the misconduct including:
 - if the conduct was unethical or involved fraud, dishonesty, or deception;
 - the vulnerability of affected persons, or the general public, e.g. due to lower sophistication, or to a relationship of trust;
 - if the respondent engaged in misconduct while knowing of, willfully blind to, or reckless of, rules or standards or risks to others, including where the respondent received warnings from BCFSA or others;
 - if the respondent demonstrably and reasonably relied on competent advice (e.g. legal advice); and
 - the duration, number of instances, or any pattern of misconduct, e.g. isolated, or repeated, pervasive or systemic;
- the respondent's experience;
- if and to what extent the respondent obtained or attempted to obtain a financial benefit, or other advantage, from the misconduct;
- the extent of harm or consequences to clients, other persons, or the general public;
- if the respondent has, prior to or during investigation:
 - acknowledged and accepted responsibility for misconduct; or
 - voluntarily taken measures to compensate or mitigate impacts on others, or to avoid recurrence of the misconduct;
- if the respondent concealed or attempted to conceal misconduct from, or mislead, affected persons or other persons;
- if the respondent has acted to frustrate, delay or undermine investigations by BCFSA;

- the impact that different forms of corrective, preventative or punitive sanctions might have on a respondent, and how those impacts might achieve specific purposes; and
- the impact of criminal or other sanctions or penalties, if any, relating to the same conduct.

The Brokerage

82. I turn first to the order sought by BCFSA in respect of the Brokerage, which was that if the Brokerage does not file its Section 75 Reports for the year ended December 31, 2021 within ninety (90) days of the date of this decision, the Brokerage's licence be immediately cancelled.
83. In its submissions in support of that order, BCFSA referred to other cases in which brokerages had still not filed required materials at the time the order was issued.
84. In two of those cases, the order issued against the brokerage was generally that the brokerage's licence would be cancelled if the required section 75⁶ filing was not made within 90 days of the order: *Radelet (Re)*, 2013 CanLII 16229 (BC REC); *Dominion Grand Realty Corp (Re)*, 2013 CanLII 65306 (BC REC)⁷. In another case, *Davreux (Re)*, 2007 CanLII 71632 (BC REC), which proceeded to a hearing, the panel ordered that if the Section 75 Report was not filed within a month, the brokerage would be suspended for 60 days, and if the report was not filed by the end of the suspension, the brokerage's licence would be cancelled.
85. In my view, the order sought in respect of the Brokerage is reasonable, and proportionate in view of the contravention committed on the part of the Brokerage and having considered prior orders issued in similar circumstances.
86. I further consider that order to be in keeping with the overarching purposes of sanctions as discussed above, in that it serves to denounce the misconduct, prevents and discourages future misconduct, and maintains public confidence in the real estate industry. I note that Ms. Jacobson did not, on behalf of the Brokerage, make any submissions arguing against the imposition of the order sought.

Ms. Jacobson

87. I turn then to the orders sought in respect of Ms. Jacobson. BCFSA specifically seeks orders that Ms. Jacobson's managing broker licence be immediately cancelled, and that Ms. Jacobson be permitted to continue being licensed as an

⁶ Prior to August 1, 2021, the applicable rule was section 7-7.

⁷ Both *Radelet* and *Dominion* were consent orders.

associate broker or representative. Further, BCFSA seeks an order that Ms. Jacobson be required to complete the Broker's Licensing Course offered by the Real Estate Division of the UBC Sauder School of Business prior to being permitted to requalify as a managing broker.

88. BCFSA submitted that Ms. Jacobson's lack of responsiveness to BCFSA's enquiries was an aggravating factor to consider. Further, BCFSA noted the length of time the Section 75 Reports had been outstanding as an aggravating factor. In general, BCFSA submitted that Ms. Jacobson had largely not acknowledged her misconduct in a substantial manner.
89. Specifically, BCFSA noted that although Ms. Jacobson had acknowledged the contravention, she failed to provide any updates as to when the filings could be expected between January and April 2023. Finally, BCFSA noted that RESA places special regulatory obligations on managing brokers, and submitted that if a managing broker failed to meet their regulatory obligations, they ought no longer be permitted to act as managing brokers.
90. Ms. Jacobson, on the other hand, took the position that the failure to file the Section 75 Reports was more of a "housekeeping issue". She stated that she knew that the filing needed to be done, that she had done the best she could, and that she would have the filings done "a short period of time from now".
91. At the outset of my consideration of the appropriate orders in respect of Ms. Jacobson, I acknowledge that Ms. Jacobson has no formal disciplinary record as a managing broker. That fact, however, does not mean that a sanction is not required in this case.
92. I note that I do not consider there to be any doubt that by October 2022, all of the information required to complete the Section 75 Reports was in the hands of Ms. Jacobson, the Brokerage, and presumably Ms. Jacobson provided all of that information to the accountant at that time. Despite that fact, those section 75 filings remained incomplete at the time of the hearing of this matter, nearly one year after the filings were originally due.
93. In my view, the ongoing delay in filing the Section 75 Reports is an aggravating factor.
94. That ongoing delay demonstrates, in my view, an ongoing viewpoint on the part of Ms. Jacobson, that she is able to choose what should be her priority in terms of her work as a managing broker.

95. I note in particular that Ms. Jacobson, in both her correspondence to BCFSA and in her testimony, indicated that she was more focused on her clients than whether or not the Brokerage was in compliance with section 75 of the Rules.
96. While, as I indicated above, Ms. Jacobson's described commitment to serving her clients is in some ways laudable, the fact remains that Ms. Jacobson was licensed as a managing broker. She had, in that role, special duties that were required of her under RESA and under the Rules. Simply put, in her position, it was not open to Ms. Jacobson to simply choose to not comply with the Rules. In my view, on all of the evidence, it is difficult to conclude that the ongoing failure to file the Section 75 Reports has been, at least to some degree, a choice on the part of Ms. Jacobson, due to her prioritization choices.
97. In summary, I consider that although Ms. Jacobson has repeatedly said that she is aware of her obligations to ensure compliance with the Rules, her actions indicate that she has not made a serious attempt to in fact attain that compliance. The fact of the ongoing lack of filing of the 2021 Section 75 Reports is, in my view, telling in this respect. I note further that in her testimony at the hearing of this matter, the respondents indicated that the 2022 Section 75 Reports would likely be coming shortly after the 2021 Section 75 Reports were filed. She did not, however, indicate that the 2022 Section 75 Reports would be filed by April 30, 2023. I agree with the submission of counsel for BCFSA that specific deterrence is required in this case in order to ensure future compliance with the Rules, and I agree that the cancellation of Ms. Jacobson's managing broker licence will serve to achieve that specific deterrence.
98. I further consider that the need for general deterrence also supports the cancellation of Ms. Jacobson's managing broker's licence.
99. While I acknowledge that the failure to ensure that the Brokerage filed its Section 75 Reports does not appear to have had any significant impact on the public, I do not consider that fact on its own to mean that the misconduct engaged in by Ms. Jacobson was not severe.
100. As set out above, an overarching purpose of the regulatory scheme is to protect the public and to maintain public confidence in the real estate industry.
101. In my view, in order to maintain public confidence in the real estate industry and the Superintendent's ability to protect the public, the Superintendent cannot be seen to allow such a lengthy, and (in the sense that Ms. Jacobson did not prioritize bringing the Brokerage back into compliance with section 75) purposeful contravention to occur without issuing a significant consequence to the licensee who has engaged in the contravention. Simply put, while I acknowledge Ms. Jacobson's submissions, I am of the view that general deterrence requires that a

sanction be applied which will demonstrate to others that compliance with the Rules is not optional.

102. Finally, I consider that for the cancellation of Ms. Jacobson's to have an effect which achieves both specific and general deterrence, there must be a requirement that she complete further education prior to being licensed as a managing broker once again.
103. In my view, the fact that Ms. Jacobson viewed the contravention of section 75 of the Rules on the part of the Brokerage, for nearly a year by the time of the hearing, as little more than a "housekeeping" issue, supports the conclusion that requiring further education on the duties and responsibilities of a managing broker is warranted in this case.
104. Finally, I note that the orders sought by BCFSA are similar to that issued in previous cases of contraventions in respect of Section 75 Report filings, and I note in particular *Pratten (Re)*, 2009 CanLII 15625 (BC REC).
105. Given my findings set out above, I will make the orders sought by BCFSA in respect of Ms. Jacobson.

Enforcement Expenses

106. Sections 43(2)(h) and 44(1) and (2) of RESA provides that the Superintendent may, after determining a licensee has committed professional misconduct, require the licensee to pay the expenses, or part of the expenses, incurred by BCFSA in relation to either or both the investigation and the hearing to which the order relates. Pursuant to section 44(2)(a), amounts ordered under section 43(2)(h) must not exceed the applicable prescribed limit in relation to the type of expenses to which they relate, and may include the remuneration expenses incurred in relation to employees, officers or agents of BCFSA engaged in the investigation or hearing.
107. Section 4.4 of the Regulation sets out the maximum amounts the Superintendent may order a licensee to pay under section 43(2)(h) in relation to various activities such as investigator costs, legal services costs, disbursements, administrative expenses for days of hearings, witness payments, and other expenses, reasonably incurred, arising out of a hearing or an investigation.
108. BCFSA has submitted a schedule of enforcement expenses, which identifies the hours incurred by in-house BCFSA counsel assigned to the respondents' case both in the lead up and at the hearing of this matter, as well as other administrative expenses, witness payments, and other costs incurred in respect of the hearing of

this matter. That schedule sets out that the total amount of the enforcement expenses is \$10,562.00.

109. In considering an order regarding enforcement expenses, the panel of the former Real Estate Council of British Columbia, in *Siemens (Re)*, 2020 CanLII 63581, considered the relevant sections of RESA and noted that:

62. Enforcement expenses are a matter of discretion. A discipline committee will ordinarily order expenses against a licensee who has engaged in professional misconduct or conduct unbecoming a licensee. Orders for enforcement expenses serve to shift the expense of disciplinary proceedings from all licensees to wrongdoing licensees. They also serve to encourage consent agreements, deter frivolous defenses, and discourage steps that prolong investigations or hearings.

63. ... The practice of discipline committees has also been to assess reasonableness of enforcement expenses by examining the total amounts in the context of the duration, nature, and complexity of the hearing and its issues. While a discipline committee may reduce any award of enforcement expenses to account for special circumstances, such as where the Council fails to prove one or more allegations corresponding to a significant and distinct part of a liability hearing, no such special circumstances arise in this case.

110. I agree that an order respecting enforcement expenses is a matter of discretion. I consider that in considering such an order, it is necessary to take into account the context of the duration, nature and complexity of the investigation process and the hearing process. I also consider it to be clear that section 43(2)(h) specifically contemplates that the expenses of an investigation and hearing may be borne not by the regulator, but by the person who engaged in the real estate activity.

111. While the hearing of this matter was limited to one day, I do not consider there to be anything in the claimed expenses to be inordinate or unnecessary. Certainly, while the majority of the expense relates to time incurred by internal BCFSA counsel prior to the hearing of this matter, a review of the correspondence leading up to the hearing demonstrates, in my view, that the time spent by counsel was required in order to continue to move the matter forward. While the expenses claimed may have been reduced if Ms. Jacobson had responded to various correspondence from counsel in the months leading up to the hearing more regularly, I consider that fact to support the claim for reimbursement of

expenses, rather than to call into question the expense amount claimed for legal counsel time.

112. Having consideration to the context of the lead up to the hearing, including the nature and complexity of the matter and the process leading up to the hearing, I am of the view that the claimed expenses are reasonable, and should be incurred by the respondents.

113. I find that the enforcement expenses requested, in the amount of \$10,562.00, should be ordered.

Conclusion

114. I find that Pace Realty Corporation committed professional misconduct within the meaning of section 35(1)(a) of RESA by breaching section 75 of the Rules when it failed to file its required review engagement financial statement, accountant's report, and brokerage activity report for the year ended December 31, 2021, by April 30, 2022.

115. I further find that Mary-Jean (MJ) Jacobson, while the managing broker of Pace Realty Corporation, committed professional misconduct within the meaning of section 35(1)(a) of RESA by breaching section 6(2)(b) of RESA and section 28(1)(a) and (b) of the Rules when she failed to ensure Pace Realty Corporation comply with section 75 of the Rules.

116. Having made those findings, pursuant to section 43 of RESA I order that:

- a. Mary-Jean (MJ) Jacobson's managing broker licence is immediately cancelled. Mary Jean (MJ) Jacobson shall be permitted to continue being licensed as an associate broker or representative.
- b. Mary-Jean Jacobson is required to complete the Broker's Licensing Course offered by the Real Estate Division of the UBC Sauder School of Business prior to applying for licensure as a managing broker.
- c. If Pace Realty Corporation does not file its review engagement financial statement, accountant's report, and brokerage activity report for the year ended December 31, 2021 within ninety (90) days of the date of this order, the Brokerage's licence shall be immediately cancelled.
- d. Mary-Jean Jacobson and Pace Realty Corporation are jointly and severally liable for enforcement expenses in the amount of \$10,562.00 to

be paid to BCFSA within 90 days of this Order, pursuant to section 43(2)(h) of RESA.

117. If Mary-Jean Jacobson and/or Pace Realty Corporation fails to comply with any term of the above orders, the Superintendent may suspend or cancel their licences without further notice to them, pursuant to sections 43(3) and 43(4) of RESA.

118. Ms. Jacobson and/or Pace Realty Corporation have the right to appeal this decision to the Financial Services Tribunal under section 54(1)(e) of the RESA, within 30 days from the date of the decision: *Financial Institutions Act*, RSBC 1996, ch 141, section 242.1(7)(d) and *Administrative Tribunals Act*, SBC 2004, section 24(1).

Issued at Kelowna, British Columbia, this 5^h day of May, 2023.

“ANDREW PENDRAY”

Andrew Pendray
Chief Hearing Officer