

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

AND

IN THE MATTER OF

MARILYN FAWN BALL
(148287)

AND

IAN ALEXANDER HEATH
(092461 – SURRENDERED)

CONSENT ORDER

RESPONDENT: Marilyn Fawn Ball, Representative, Island Group Services Inc. dba Engel & Volkers Vancouver Island, while licensed with Jonesco. Real Estate Inc.

Ian Alexander Heath, Surrendered, while licensed with Jonesco. Real Estate Inc.

DATE OF REVIEW MEETING: December 19, 2019

DATE OF CONSENT ORDER: January 9, 2020

DISCIPLINE COMMITTEE: Y. Amlani

ALSO PRESENT: Michael Shirreff, Legal Counsel for
the Real Estate Council of BC

Catherine Davies, Legal Counsel for
the Real Estate Council of BC

Michael Velletta, Legal Counsel for
the Respondents

Marilyn Fawn Ball and Ian Alexander Heath

PROCEEDINGS:

On December 19, 2019, the Discipline Committee resolved to accept the Consent Order Proposal (the "Proposal") submitted by Marilyn Fawn Ball and Ian Alexander Heath.

WHEREAS the Proposal, a copy of which is attached hereto, has been executed by Marilyn Fawn Ball and Ian Alexander Heath.

NOW THEREFORE, having made the findings proposed in the attached Proposal, and found that Marilyn Fawn Ball and Ian Alexander Heath committed professional misconduct within the meaning of section 35(1)(a) of the *Real Estate Services Act* ("RESA") and sections 3-3(f), 5-8(1)(a)(b) and 5-11 of the Rules made under the RESA, pursuant to section 43 of the RESA the Discipline Committee orders that:

1. Marilyn Fawn Ball and Ian Alexander Heath each pay a discipline penalty to the Council in the amount of \$2,500 within three (3) months from the date of this Order;
2. Marilyn Fawn Ball, at her own expense, register for and successfully complete the Real Estate Trading Services Remedial Education Course, as provided by the Sauder School of Business at the University of British Columbia in the time period as directed by the Council; and
3. Marilyn Fawn Ball and Ian Alexander Heath each pay enforcement expenses to the Council in the amount of \$1,000 within two (2) months from the date of this Order.

If Marilyn Fawn Ball fails to comply with any term of this Order, the Council may suspend or cancel her licence without further notice to her, pursuant to sections 43(3) and 43(4) of the RESA.

Dated this 9th day of January 2020 at the City of Vancouver, British Columbia.

ON BEHALF OF THE DISCIPLINE COMMITTEE

"Yasin Amlani"

Yasin Amlani

Discipline Committee

THE REAL ESTATE COUNCIL OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF

MARILYN FAWN BALL (148287) and IAN ALEXANDER HEATH (092461-Surrendered)

CONSENT ORDER PROPOSAL

BACKGROUND AND FACTS

This Consent Order Proposal (the "Proposal") is made by Marilyn Fawn Ball ("Ms. Ball") and Ian Alexander Heath ("Mr. Heath") to the Discipline Committee (the "Committee") of the Real Estate Council of British Columbia (the "Council") pursuant to section 41 of the *Real Estate Services Act* ("RESA").

For the purposes of the Proposal, Ms. Ball, Mr. Heath and the Council have agreed upon the following facts:

Overview

1. Ms. Ball (148287) has been continuously licensed with the Council as a representative for trading services since 2006.
2. Mr. Heath (092461 - Surrendered) was continuously licensed with the Council as a representative for trading services dating back to 1991. Mr. Heath is now retired and, as of May 23, 2018, is no longer licensed with the Council.
3. Prior to this matter, Mr. Heath and Ms. Ball did not have a discipline history with the Council.
4. Ms. Ball and Mr. Heath were at the material time both licensed as representatives for trading services with JonesCo. Real Estate Inc. (the "Brokerage" or "Jonesco"). Ms. Ball and Mr. Heath will be referred to herein as "Heath/Ball".
5. In July 2016, Heath/Ball entered into an agreement with another real estate agent ("JZ"), who was also licensed as a representative for trading services at the Brokerage. In particular, the parties agreed that Heath/Ball would refer potential purchasers to JZ for properties listed for sale by Heath/Ball.
6. These potential purchasers were people who Heath/Ball knew from their client network. Instead of acting for both the sellers and buyers in a limited dual agency capacity, Heath/Ball

would act as the Designated Agents for the sellers and would refer the purchasers to JZ, who was also licensed with the Brokerage and who would act as the Designated Agent for the buyers.

7. For the purposes of this matter, the key term of the agreement between Heath/Ball and JZ was the manner in which the parties agreed to allocate the total commissions paid to the Brokerage for the purchase and sale. As per the terms of the Multiple Listing Contracts, the total commissions for each purchase and sale were paid by the sellers.
8. In broad terms, Heath/Ball and JZ agreed that if the client referral by Heath/Ball led to a completed purchase and sale of a property, then 2/3 of the net commission payable to JZ as the Designated Agent for the buyers would be allocated within the Brokerage to Heath/Ball.
9. In her written response to the Council in this proceeding, dated February 22, 2018, Ms. Jones summarized the parties' agreement on the commission allocation as follows: "... [JZ] agreed to be paid by Jonesco... 33 and 1/3rd percent of the Designated Buyer's Agent commission from any sales."
10. During the material period, as described below, there were three properties bought and sold where Heath/Ball referred the purchaser to JZ and the commissions were allocated within the Brokerage in accordance with the above-described agreement.

Nitinat Road

11. On March 8, 2016, Jonesco entered into a Multiple Listing Contract with SH and NC to sell their home located at XXXXX Nitinat Road, North Saanich, BC (the "Nitinat Property"). The contract provided that the listing brokerage would receive a gross commission of 6% on the first \$100,000 and 3% on the remainder. The commission for the cooperating broker was stated in the agreement as being half of the gross commission.
12. Heath/Ball were listed in the Multiple Listing Contract as the Designated Agents for the sellers of the Nitinat Property.
13. On August 9, 2016, JZ prepared a Contract of Purchase and Sale on behalf of the buyer TW to purchase the Nitinat Property from SH and NC. In the Contract of Purchase and Sale, it was noted that: SH and NC had an agency relationship with Ms. Ball as the Designated Agent who was licensed with Jonesco (Mr. Heath was not referred to); and the buyer, TW, had an agency relationship with JZ as the Designated Agent, who was also licensed with Jonesco.
14. The purchase price for the Nitinat Property was \$699,000. The sale completed on September 27, 2016 and title was transferred to TW.

Chalet Road

15. On August 4, 2016, Jonesco entered into a Multiple Listing Contract with SW and DW to sell their property at XXXXX Chalet Road in Saanich, BC (the "Chalet Property"). The contract provided that the listing brokerage would receive a gross commission of 6% on the first \$100,000 and 3% on the remainder. The commission for the cooperating broker was stated in the agreement as being half of the gross commission.

16. Heath/Ball were listed in the Multiple Listing Contract as the Designated Agents for the sellers of the Chalet Property.
17. On October 6, 2016, JZ prepared a Contract of Purchase and Sale on behalf of MK to purchase the Chalet Property from SW and DW. In the Contract of Purchase and Sale, it was noted that: SW and DW had an agency relationship with Ms. Ball/Mr. Heath as the Designated Agents who were licensed with Jonesco; and the buyer, MK, had an agency relationship with JZ as the Designated Agent, who was also licensed with Jonesco.
18. The purchase price for the Chalet Property was \$770,000. The sale completed on February 13, 2017 and title was transferred to MK.

Harbour Road

19. On November 3, 2016, Jonesco entered into a Multiple Listing Contract with SW and DW to sell their property at XXX-XXXX Harbour Road, Sidney, BC (the "Harbour Property"). The contract provided that the listing brokerage would receive a gross commission of 6% on the first \$100,000 and 3% on the remainder. The commission for the cooperating broker was stated in the agreement as being half of the gross commission.
20. Heath/Ball were listed in the Multiple Listing Contract as the Designated Agents for the sellers of the Harbour Property.
21. On December 29, 2016, JZ prepared a Contract of Purchase and Sale on behalf of JM and GG to purchase the Harbour Property from SW and DW. In the Contract of Purchase and Sale, it was noted that: SW and DW had an agency relationship with Heath/Ball as the Designated Agents who were licensed with Jonesco; and the buyers, JM and GG, had an agency relationship with JZ as the Designated Agent, who was also licensed with Jonesco.
22. The purchase price for the Harbour Property was \$200,000. The sale completed on April 12, 2017 and title was registered to JM and GG.

Commission allocations within the Brokerage

23. With respect to the purchase and sale of the above three properties (the Nitinat, Chalet and Harbour Properties), Heath/Ball advised each seller as to the total amount of the commission paid to the Brokerage with respect to the sale of their property. These commissions were set out in the Multiple Listing Contracts executed by the sellers.
24. However, at that time, Heath/Ball did not understand that they had a professional obligation to advise the sellers of these three properties that, because of their agreement with the buyer's agent, JZ, the total commission was going to be allocated within the Brokerage in a manner that would see Heath/Ball receive 2/3 of the commission allocated to JZ as the Designated Agents for the buyers in addition to their commission as the Designated Agents for the sellers.
25. Heath/Ball believed that they were complying with their professional obligations by ensuring that the sellers of these properties were aware of the total commission payable to the Brokerage on account of the purchase and sale.

26. When it came time for the Brokerage to pay the net commissions with respect to these three transactions, in accordance with the agreement between Heath/Ball and JZ, the Brokerage allocated the net commission for the listing agent side of each transaction to Heath/Ball, as well as 2/3 of the net purchasing agent's commission.
27. At the time that these allocations and payments were made by the Brokerage, Heath/Ball's managing broker was fully aware of the agreement between Heath/Ball and JZ and knew that the licensees had agreed to allocate the commissions in such a way. The managing broker did not raise any concerns about the nature of this agreement and did not suggest to Heath/Ball that they needed to make additional disclosure to their clients about the commission allocations. Further, none of Heath/Ball's clients raised any concerns about these issues with the Council or Heath/Ball's managing broker.
28. At the time of these transactions, Heath/Ball did not advise their clients, the sellers of the Nitinat, Chalet and Harbour Properties, that they were receiving 2/3 of the commission that would ordinarily have been allocated by the Brokerage to JZ with respect to the purchase and sale of each property.

PROPOSED FINDINGS OF MISCONDUCT

For the sole purposes of the Proposal and based on the facts outlined herein, Mr. Heath and Ms. Ball propose the following findings of misconduct be made by the Committee:

1. Mr. Heath and Ms. Ball committed professional misconduct within the meaning of section 35(1)(a) of the RESA by not disclosing to their seller clients the fact that they were to receive 2/3 of the commission allocated by the Brokerage to the buyer's agent with respect to the purchase and sale of the following three properties:
 - i. the Nitinat Property;
 - ii. the Chalet Property; and
 - iii. the Harbour Property.

contrary to sections 3-3(f) [*disclose to the client all known material information respecting the real estate services, and the real estate and the trade in real estate to which the services relate*]; 5-8(1)(a) and (b) [*disclosures must be in writing*]; and 5-11 [*disclosure of remuneration*] of the Rules.

PROPOSED ORDERS

Based on the facts herein and the Proposed Findings of Misconduct, Mr. Heath and Ms. Ball propose that the Notice of Discipline Hearing in this matter be resolved through the following Orders being made by the Committee, pursuant to section 43 of the RESA:

1. Mr. Heath and Ms. Ball each pay a discipline penalty to the Council in the amount of \$2,500 within ninety (90) days from the date of this Order.

2. Ms. Ball, at her own expense, register for and successfully complete the Real Estate Trading Services Remedial Education Course as provided by the Real Estate Division, Sauder School of Business at the University of British Columbia in the time period as directed by the Council.
3. Mr. Heath and Ms. Ball each pay enforcement expenses to Council in the amount of \$1,000 within sixty (60) days from the date of this Order.
4. If Ms. Ball fails to comply with any of the terms of this Order, a Discipline Committee may suspend or cancel Ms. Ball's licence without further notice to her.

ACKNOWLEDGEMENTS AND WAIVER OF APPEAL RIGHT

1. Mr. Heath and Ms. Ball acknowledge that they been urged to and given the opportunity to seek and obtain independent legal advice with respect to the disciplinary process, the allegations contained in the Notice of Discipline Hearing, and the execution and submission of the Consent Order; and, that they have obtained independent legal advice and are making the Proposal with full knowledge of the contents and the consequences if the Proposal is accepted.
2. Mr. Heath and Ms. Ball acknowledge and are aware that the Council will publish the Proposal and the Consent Order or summaries thereof in its Report from Council newsletter, on the Council's website, on CanLII, a website for legal research and in such other places and by such other means as the Council in its sole discretion deems appropriate.
3. Mr. Heath and Ms. Ball acknowledge and are aware that the Superintendent of Real Estate has the right, pursuant to section 54 of the RESA, to appeal any decision of the Council, including any Consent Order made by the Council in relation to this matter.
4. Mr. Heath and Ms. Ball hereby waive their right to appeal pursuant to section 54 of the RESA.
5. The Proposal and its contents are made by Mr. Heath and Ms. Ball for the sole purpose of resolving the Notices of Discipline Hearing in this matter and do not constitute an admission of civil liability. Pursuant to section 41(5) of the RESA, the Proposal and its contents may not be used without the consent of Mr. Heath and Ms. Ball in any civil proceeding with respect to the matter.

"Marilyn Fawn Ball"

MARILYN FAWN BALL

Dated 6th day of January 2020

"Ian Alexander Heath"

IAN ALEXANDER HEATH

Dated 6th day of January, 2020