

IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*

S.B.C. 2004, c. 42 as amended

AND

**JACOB GIESBRECHT SIEMENS
(064483)**

REASONS FOR DECISION REGARDING LIABILITY

Date and Place of Hearing:	September 4, 2019. Office of the Real Estate Council of British Columbia (RECBC)
Discipline Hearing Committee:	Len W. Hrycan, Committee Chair David Peerless, Committee Member Robert Gialloreto, Committee Member
Counsel for RECBC:	David T. McKnight Alexander Holburn Beaudin Lang LLP
Respondent:	Jacob Giesbrecht Siemens, appearing on his own behalf

INTRODUCTION

1. The hearing was conducted before a Discipline Hearing Committee (the “Committee”) of the Real Estate Council of British Columbia (the “Council”) pursuant to section 42 of the *Real Estate Services Act*, R.S.C. 2004, c. 42 (“RESA” or the “Act”) to consider whether Mr. Jacob Giesbrecht Siemens (the “Respondent”) committed professional misconduct within the meaning of section 35(1) of RESA.
2. This matter relates to the professional obligations of a managing broker to ensure that the business of the brokerage is carried out competently and in accordance with the RESA. At all material times, the Respondent was the managing broker of 0808509 BC Ltd. doing business as Sutton – Showplace Realty (2015), formerly known as Landmark Realty, in Chilliwack, British Columbia (the “Brokerage”). The conduct at issue relates to

his supervising a licensee respecting property located at XXXX Humphrey Road in XXXXXXXX, British Columbia (the "Property") and owned by Ms. MXXXX (the "Client").

ISSUES

3. The issues before the Committee are set out in the Second Amended Notice of Discipline Hearing dated July 17, 2019 as follows:
 1. You committed professional misconduct within the meaning of section 35(1)(a) of the RESA when, in your capacity as a managing broker and in relation to the 2014 listing of a property located at XXXX Humphrey Road, XXXXXXXX, B.C. (the "Property"), you:
 - a. suggested to the listing agent for the Property, Lawrence EXXXXXXXX, that he provide a loan (the "Loan") secured by a mortgage against the Property to his client, SXXXX MXXXX, so that she could continue with construction on the Property;
 - b. failed to properly advise Mr. EXXXXXXXX that the Loan could place him in a potential conflict of interest and to take reasonable and appropriate steps to avoid any conflict of interest contrary to sections 3-3 (a) [act in best interest of client], 3-3(d) [advise client to seek independent professional advice on matters outside expertise], 3-3(i)[take reasonable steps to avoid a conflict of interest]; 3-3(j) [fully disclose the conflict to the client] and 3-4 [act with reasonable care and skill] of the Rules; and
 - c. failed to ensure that Mr. EXXXXXXXX documented the terms of the Loan before agreeing to pay the construction invoices contrary to section 3-4 [act with reasonable care and skill] and that Mr. EXXXXXXXX advised Ms. MXXXX to seek independent legal advice about the Loan, the promissory note and the second mortgage that was to be registered against the Property

contrary to section 3-3(d)[advise client to seek independent professional advice on matters outside expertise],

contrary to sections 3-1(1)(b) [ensure business of the brokerage is carried out competently] of the Rules.

BURDEN OF PROOF AND EVIDENCE

The burden and standard of proof:

4. Under section 43 of the RESA, the Committee may determine that the Respondent has committed professional misconduct or dismiss the matter.
5. The burden of proof is on the Council to demonstrate that the Respondent committed professional misconduct. The standard of proof is, as in every civil case, the balance of probabilities. The balance of probabilities means that the Committee must be satisfied, based on the evidence that is sufficiently clear, convincing and cogent, that the occurrence of an event was more likely than not: *F.H. v. McDougall*, 2008 SCC 53.

The evidence that the Committee may accept:

6. As an administrative tribunal, the Committee is not bound by court rules of evidence, in the absence of any statutory provision to the contrary, and it may consider evidence it considers relevant: *Wilson v. Esquimalt and Nanaimo Railway Company Co.*, [1922] 1 A.C. 202 (P.C.) [B.C.]; *Kane v. The Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105; *Hale v. B.C. (Superintendent of Motor Vehicles)*, 2004 BCSC 1358 at para. 23. The Committee may, however, draw upon principles underlying court rules of evidence to exclude or assess evidence.
7. As a public authority, the Committee 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 Committee affords every respondent an opportunity to respond to the case against them by providing advance notice of the issues and the evidence, and an opportunity to present evidence and argument. The Committee must determine facts and decide issues set out in the Notice of Discipline

Hearing, based on evidence. Committee members may, however, apply their individual expertise and judgment to how they evaluate or assess evidence.

REASONS

The evidence before the Committee:

8. The evidence in the hearing consisted of two exhibits, which included a Book of Documents from the Council, as well as one additional exhibit from the Respondent. The Committee heard testimony from Mr. LXXXXXXX EXXXXXXX, witness of the Council. The Respondent, Mr. Siemens, gave evidence and testimony on his own behalf.

Findings of fact:

9. The Respondent has been a licensed managing broker since December 21, 2007. (Exhibit 1 Tab 30) The Respondent acknowledged that he was fully aware of the need to comply with the RESA and that the Real Estate Council of British Columbia provides a Professional Standards Manual and Brokerage Standards Manual to assist licensees in carrying out their duties.
10. The Respondent was managing broker of the Brokerage at all material times during the transactions for the Property.
11. Mr. LXXXXXXX EXXXXXXX, was a licensee at the Brokerage and acted as the Agent for the Client in March of 2014 for the purchase of the Property in the amount of \$210,000. (Exhibit 1 Tab 5 & 6)
12. The Client intended to build a carriage house, garage and kennel on the Property and asked Mr. EXXXXXXX to assist her in finding a contractor. Construction commenced on the Property; however the Client ran into financial problems and could not afford to complete construction.
13. In October 2014, the Client contacted Mr. EXXXXXXX about listing the Property for sale with construction partially completed because she could not afford to complete construction. At that time, Mr. EXXXXXXX had only been licensed for approximately 12 months.

14. On October 15, 2014, Mr. EXXXXXXXX sought the assistance of his managing broker and attended the property with the Respondent to assess its value, given that construction at the time was approximately 80-85% complete.
15. The Respondent and Mr. EXXXXXXXX discussed the implications of trying to sell the property in its partially completed state and what the best course of action would be. They concluded that finishing construction of the home would be the most advantageous to the Client. During these discussions, the Respondent suggested to Mr. EXXXXXXXX that he could consider a loan to the Client, as one of several financing options, to assist the Client with finishing construction. In doing so, the Respondent did not provide any clarification to his licensee that there were mandatory requirements to disclose a potential conflict of interest created by a loan offer, to document the nature of the loan and to instruct his Client to seek independent legal advice in relation to such a loan offer. The only caution that the Respondent gave to Mr. EXXXXXXXX in regard to a loan was to secure his loan by way of a second mortgage on the Property. (Exhibit 1 Tab 22 & 25)
16. Once the Respondent had suggested that Mr. EXXXXXXXX consider a loan offer to the Client, as managing broker he assumed an obligation to ensure that this was documented appropriately, thereby ensuring that it protected the interests of the Client, Mr. EXXXXXXXX and the brokerage. This obligation was heightened by the relative inexperience of Mr. EXXXXXXXX who was under the Respondent's supervision as a licensee.
17. On October 15, 2014, the Client entered into a Multiple Listing Contract with Mr. EXXXXXXXX acting as her designated agent to list the Property for \$389,000. (Exhibit 1 Tab 9)
18. Mr. EXXXXXXXX subsequently decided to loan the Client funds to pay for the outstanding construction invoices to complete construction on the home. In exchange, the Client was to execute a promissory note and enable a second mortgage to be registered against the Property.

19. Mr. EXXXXXXXX paid outstanding construction invoices in the amount of \$14,200.89 on October 17, 2014 and \$19,663.13 on October 27, 2014. (Exhibit 1 Tab 11 & 13)
20. On October 21, 2014, Mr. EXXXXXXXX's lawyer drafted two promissory notes for execution by the Client. (Exhibit 1 Tab 12)
21. The Client refused to execute any documents respecting the Loan and advance of funds on the outstanding construction invoices by Mr. EXXXXXXXX. The Client additionally requested that Mr. EXXXXXXXX terminate the listing contract for the property, to which he did take steps to provide the Client with the appropriate cancellation documents, however the Client did not execute these.
22. The Client completed construction of the home on the Property and received an occupancy certificate in early December of 2014.
23. On January 9, 2015, Mr. EXXXXXXXX commenced a Supreme Court action against the Client for \$33,864.02 plus interest, to collect amounts paid to the construction company for the outstanding invoices. (Exhibit 1 Tab 17)
24. On February 23, 2015, Mr. EXXXXXXXX commenced a Small Claims action in the amount of \$16,689.50 against the Client in relation to his lost commission pursuant to the Multiple Listing Contract. Exhibit 1 Tab 18)
25. A Certificate of Pending Litigation was registered on the title of the Property on January 14, 2015. (Exhibit 1 Tab 21)
26. On February 8, 2016, the Client filed a complaint with the Real Estate Council of British Columbia respecting Mr. LXXXXXXX EXXXXXXXX. (Exhibit 1 Tab 20)
27. The Property was subsequently listed for sale by the Client on June 16, 2016 for the price of \$424,900 and sold for the full listing price on June 22, 2016. (Exhibit 2)

Findings on professional misconduct:

28. The term "professional misconduct" is defined in the RESA. The relevant section for this case is:

35(1) A licensee commits professional misconduct if the licensee does one or more of the following:

a) contravenes this Act, the regulations or the rules....

29. Rule 3-1(1) provides as follows:

3-1(1) *Supervision* – A managing broker must:

(a) be actively engaged in the management of their related brokerage,

(b) ensure that the business of the brokerage is carried out competently and in accordance with the Act, regulations, rules and bylaws, and

(c) ensure that there is an adequate level of supervision for related associate brokers and representatives and for employees and others who perform duties on behalf of the brokerage.

30. After considering all of the evidence and the testimony of Mr. EXXXXXXXX and the Respondent, the Discipline Hearing Committee deliberated. The Committee acknowledged its duty to make findings, if any, of professional misconduct on the balance of probabilities and with clear, convincing and cogent evidence.

DECISION

31. On the basis of the evidence and testimony, the Discipline Hearing Committee determines that Jacob Giesbrecht Siemens committed professional misconduct within the meaning of section 35(1)(a) of the RESA, and specifically contravened Rule 3-1(1)(b) in his capacity as a managing broker and in relation to the 2014 listing of the Property, through the following acts and omissions.

32. Respecting Notice Item **#1(a)**, the Respondent suggested to Mr. EXXXXXXXX, the listing agent for the Property, that Mr. EXXXXXXXX provide a Loan to the Client, to be secured by a mortgage against the Property. Such a Loan would have placed Mr. EXXXXXXXX in a conflict of interest.

33. Mr. EXXXXXXXX admitted in a separate disciplinary proceeding, and the Committee accepts in this proceeding, that the Loan did in fact place Mr. EXXXXXXXX in an actual or potential conflict, as his ability to objectively represent the Client was compromised by the benefits he stood to gain. Specifically, the Loan created a situation where the Client became financially indebted to Mr. EXXXXXXXX and the Loan was meant to increase the sale value of the property from its partially completed state, thereby increasing the potential commission Mr. EXXXXXXXX was to receive. Further, Mr. EXXXXXXXX stood to benefit from the interest charged on the Loan if the property did not sell. His advice about how the Client might deal with the property could have been affected by his own interests as a creditor and as an investor in improvements. The Committee referenced *Magnus (Re)*, 2015 CanLII 90646 (BC REC), which illustrates a loan giving rise to a conflict of interest. Further still, in advising Mr. EXXXXXXXX to obtain a second mortgage to secure his Loan, the Respondent was advising Mr. EXXXXXXXX to acquire a direct security interest in the very property about which he was representing the Client.
34. Respecting Notice Item **#1(b)**, the Respondent failed to advise Mr. EXXXXXXXX that the Loan would place Mr. EXXXXXXXX in a conflict of interest, and failed to properly advise him to take reasonable and appropriate steps to avoid the conflict of interest, or to disclose the conflict of interest, so that Mr. EXXXXXXXX could comply with Rules 3-3(a) [act in best interest of client], 3-3(i) [take reasonable steps to avoid a conflict of interest], and 3-3(j) [fully disclose the conflict to the client] and by extension, Rule 3-4 [act with reasonable care and skill].
35. Respecting Notice Item **#1(c)**, the Respondent failed to advise Mr. EXXXXXXXX to advise the Client to seek independent legal advice on the Loan, the Promissory Note, and the second mortgage to be registered against the Property, all being matters respecting which Mr. EXXXXXXXX could not give impartial or expert advice, so that he could comply with Rule 3-3(d) [advise client to seek independent professional advice on matters outside expertise].
36. Also respecting Notice Item **#1(c)**, and putting aside the conflict of interest arising from the Loan, the Respondent failed to ensure that Mr. EXXXXXXXX documented the terms of the Loan on behalf of the Client, before to the Client proceeded with the Loan and

received funds through payment of the construction invoices, so that he would comply with Rule 3-4 [act with reasonable care and skill].

37. The Committee concluded that the Respondent did breach his obligations as managing broker. Section 6(2) (c) of the RESA provides, “6(2) A managing broker licensed in relation to a brokerage acts for the brokerage for all purposes under this Act, and is responsible for [...] (c) the control and conduct of the brokerage’s real estate business, including supervision of the associate brokers and representatives who are licensed in relation to the brokerage.”
38. The Committee referenced *Bodner v Real Estate Council (British Columbia)* [1995] BCWLD 076, 1994 CarswellBC 545 which found “the managing broker negligent in that, having been asked for advice by the agent, he failed to ensure that the agent withdrew as listing salesperson....” This finding speaks directly to the obligations of effective supervision on the part of the managing broker.
39. The Committee further referenced the *Brokerage Standards Manual* published by the Real Estate Council of British Columbia, which provides information to licensees concerning, amongst other things, conflicts of interest. The Manual expressly notes, in relation to “General Brokerage Procedures”, that the brokerage and its related licensees must take reasonable steps to avoid any conflict of interest, pursuant to Rule 3-3(i), and that, “Where a conflict of interest, which cannot be reasonably avoided, does exist, [Rule] section 3-3(j) requires the brokerage and its related licensees to ‘promptly and fully disclose the conflict to the client’.”

FURTHER MATTERS

40. The Committee will hear evidence and submissions from the parties concerning orders under section 43(2) of the RESA, and expenses under section 44(1) of the RESA, and any other actions available to the Committee, at a date, time and place to be set. Once the Committee has arrived at a decision on these issues, it will issue additional reasons that will form a part of this decision, make an order under section 43(2) of the RESA, and make such other orders under the RESA as the Committee may deem appropriate.

41. Once the Committee has made orders under Part 4, Division 2 of the RESA, the Respondent will have a right to appeal to the Financial Services Tribunal under section 54(1)(d) of the RESA, within 30 days of the date of the penalty decision: *Financial Institutions Act*, RSBC 1996, ch 141, section 242.1(7)(d) and *Administrative Tribunals Act*, SBC 2004, section 24(1).

Dated at VANCOUVER, BRITISH COLUMBIA this 2nd day of October 2019.

FOR THE DISCIPLINE HEARING COMMITTEE

“Len W. Hrycan”

Name: Len W. Hrycan

Title: Discipline Hearing Committee Chair

“Robert Gialloredo”

Name: Robert Gialloredo

Title: Discipline Hearing Committee Member

“David Peerless”

Name: David Peerless

Title: Discipline Hearing Committee Member

LIST OF EXHIBITS

- Exhibit 1 - RECBC – Book of Documents
- Exhibit 2 - MLS Listing data sheet for XXXX Humphrey Road

