

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

AND

IN THE MATTER OF

**TEJWANT DANJOU
(082704)**

AND

**555797 B.C. LTD.
DBA
SUTTON GROUP PROACT REALTY
(X026313)**

REASONS FOR ORDER IN URGENT CIRCUMSTANCES

Date and Place of Hearing:	July 31, 2018 Office of AllWest Reporting Ltd. Vancouver, BC
Discipline Committee:	Robert D. Holmes, QC
Counsel for the Real Estate Council of British Columbia:	Jessica Gossen
Court Reporter:	Keith Bemister

INTRODUCTION

- [1] An ex parte hearing was held on July 31, 2018, pursuant to sections 39 and 45(1) and (2) of the *Real Estate Services Act* (“RESA”) by a one person discipline committee (the “Committee”) of the Real Estate Council of BC (the “Council”) to consider an application by the Council for certain Orders in Urgent Circumstances, including, among other things, suspending the licences of Tejwant Danjou (“Mr. Danjou”) and 555797 B.C. Ltd. dba Sutton Group Proact Realty (“Proact Realty”).
- [2] Section 45(1) of RESA provides that a discipline committee may act under this section if the committee considers that:
- there has been conduct in respect of which a discipline committee could make an order under section 43 against a licensee,
 - the length of time that would be required to complete an investigation or hold a discipline hearing, or both, in order to make such an order would be detrimental to the public interest, and
 - it is in the public interest to make an order under this section against the licensee.

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- [3] Section 45(2) of RESA provides if the factors set out under section 45(1) apply, then the Committee may make certain orders, including suspending the licences of the licensees concerned.
- [4] Section 45(3) of RESA expressly authorizes a discipline committee to make an order under section 45(2) “(b) without giving notice to the licensee” and “(c) without providing the licensee an opportunity to be heard”. Unlike other regulatory statutes that are silent as to notice, these express provisions preclude any implied requirements that a discipline committee give a licensee notice of, or opportunity to respond to, a case for an order under section 45(2). Instead, RESA provides, under section 45(6), a right of a licensee subject to such an order to deliver written notice to the Council “to require” a discipline hearing, apart from the Council’s authority to initiate one.
- [5] Ms. Gossen acted as counsel for the Council. She presented two exhibits:
- a. Exhibit 1 – Affidavit #1 of Tony Lam, an Auditor/Investigator on the Council’s staff sworn July 31, 2018; and
 - b. Exhibit 2 – Affidavit #1 of Darrin Bean, a Senior Auditor/Investigator on the Council’s staff, sworn July 31, 2018.
- [6] Ms. Gossen submitted that the Council has acquired evidence establishing that Mr. Danjou had been charged with the offence of second degree murder and was being held in custody following his arrest on July 23, 2018.
- [7] The Committee reviewed the evidence and determined that the factors set out in section 45(1) were all established.
- [8] Upon reading the affidavits marked Exhibits 1 and 2 and hearing submissions from Ms. Gossen, legal counsel for the Council, the Committee issued an Order in Urgent Circumstances (the “Order”) on July 31, 2018, that the licences of Mr. Danjou and Proact Realty be suspended effective immediately pursuant to section 45(2) of the RESA, together with orders providing that they cease dealing with certain financial institution accounts relating to the brokerage and its clients, freezing those funds and requiring that they turn over to the Council their books and records. A copy of the Order is attached to these reasons, for ease of reference.
- [9] These are the written reasons for the Order.

BACKGROUND

- [10] Mr. Danjou is licensed under RESA as a managing broker and to provide property management services. He does so through Proact Realty and is the sole director and officer of that company. The company is licensed as a brokerage under RESA. It has only two employees. Mr. Danjou is one. Another is a trading services licensee, who I will refer to as Mr. D.
- [11] The gist of the allegations here is that Mr. Danjou was arrested in the Kelowna area on July 23, 2018, and charged with having committed second degree murder on July 22, 2018.

He is currently in custody. I was advised that a bail hearing was adjourned and may be heard on August 2, 2018.

- [12] Ms. Gossen has been in contact by email and telephone with Ms. Turko, who is acting for Mr. Danjou in relation to the criminal charges. She outlined to Ms. Turko the nature of proceedings that the Council was going to bring and invited Ms. Turko to provide any position. Ms. Turko initially advised that she would have something by Friday, July 27, 2018, to Ms. Gossen. That got changed to Monday as Ms. Turko indicated she was flying to Kelowna to meet with Mr. Danjou. Nothing was provided as at the date and time of hearing this application. Ms. Gossen submitted that it was appropriate to proceed ex parte and I accepted that in the circumstances disclosed in the affidavit materials and as related by Ms. Gossen.
- [13] Before proceeding further, it is appropriate that I set out two points that guide the decision on this application.
- [14] The first is that Mr. Danjou is entitled to the presumption of innocence that is referenced in the *Charter of Rights and Freedoms*. He has not been convicted of anything. Indeed, Ms. Gossen advised that Ms. Turko had stated that as far as she had been able to ascertain, Mr. Danjou had no previous criminal record. The Orders made on this application are not premised upon any view of what the eventual outcome of those criminal proceedings may be.
- [15] The second point is that the public interest in relation to Council's regulation of the real estate industry is the overriding concern on an application such as this. As will be made clear, there are many persons who deal with and depend upon the professional services of licensees such as Mr. Danjou and Proact Realty. When that service is not being performed and cannot be performed to the level required by RESA and the Rules, and where the circumstances disclose a pressing and immediate concern that the rights and interests of clients and others may be seriously prejudiced thereby, then the Council must protect the public interest, including by using its powers to make orders in urgent circumstances.
- [16] The facts here disclose that Mr. Danjou operates a very small brokerage, but one that has 170 residential and commercial rental properties to manage as well as some trading services transactions involving purchases and sales of real estate from time to time. There is only one other licensee associated with Proact Realty, Mr. D. He is in the process of arranging to transfer registration of his licence to another brokerage. In any event, his licence does not include property management services and he is not in a position to provide such services.
- [17] Also, this brokerage has just one managing broker, Mr. Danjou. The fact that he is absent from the office and currently unable to deal with its business and affairs makes clear that the brokerage lacks a managing broker who is in active management of its business and affairs as required by section 6 of RESA and Rule 3-1.
- [18] Under applicable law, if a brokerage does not have a managing broker, then it and the other licensees cannot continue to operate.
- [19] Also, under the Rules, it is a disciplinary offence for a managing broker not to be in active management of the brokerage with whom the managing broker's licence is registered.

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- [20] Simply put, RESA requires that a managing broker be in place at all times. Here, that has not been the case for the past several days and it is undetermined how long that situation may continue.
- [21] At the time the events here have unfolded, there was a listing that Mr. D had. That could have caused serious problems in terms of addressing how the brokerage could deal with completing such a transaction and avoid prejudicing a client's interests. But Ms. Gossen informed me that the listing lapsed and that particular matter is not a pressing concern.
- [22] What remains, however, from this "near miss", is that Mr. D, the trading services licensee, and any clients he may have who wish to buy or sell property, are affected by the lack of a managing broker and a fully functioning brokerage.
- [23] The 170 rental properties present a much more serious and immediate concern. Managing rental properties is an ongoing job and entails receipt in trust of rental income and other payments, plus disbursements made as instructed by the property owners. That requires active and ongoing attention and management. Failing to meet the responsibilities of the job can lead to serious legal and financial consequences for the clients and others affected thereby.
- [24] As an example, this application was heard on the last day of the month. Rent is due on most properties at the beginning of the month. Some is paid by post-dated cheques. Some is paid electronically. Some may be paid through other methods. Once money is in the brokerage's trust account, it is to be disbursed in accordance with client instructions and authority.
- [25] Processing the receipt and disbursement of money cannot occur if the managing broker is absent and the person responsible for signing on cheques and directions to the financial institution with which the brokerage deals is unavailable.
- [26] Further, the files of the business of Proact Realty are kept in office premises in Surrey, BC that are shared with another brokerage. That brokerage does not have a legal relationship with Proact Realty so as to provide managing broker or rental property management services. Ms. Gossen advised that there was no successor planning or coverage agreement in place that she or the Council's investigators were aware of that would apply here, given Mr. Danjou's unavailability.
- [27] Each of the clients of Proact Realty was entitled to have their private and confidential information kept private and confidential. Absent some arrangements made – preferably well in advance of a situation like this and presumably with client approval – persons from other firms are not legally entitled to access to such files.
- [28] Of subordinate, but still material, concern is the fact that the evidence disclosed by the Affidavits made Exhibits here is that Proact Realty and Mr. Danjou have a history of problems with record keeping.
- [29] While Ms. Gossen advised that there was no suggestion of misappropriation of funds detected in the audit work done to the point, there was a history going back to 2003 of failure to keep timely and accurate books and records as required. The brokerage was audited five times since then. Each time there were problems detected.

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- [30] After the 2017 audit, the Council audit staff recommended to Mr. Danjou, among other things, that the brokerage not take on any more rental property matters until such time as they had additional staff and resources so as to comply with RESA and the Rules. He acknowledged and accepted that. But he does not appear to have done anything to expand the staffing and resources required in the ensuing year.
- [31] In June 2018, Mr. Danjou reported to the Council auditors that there were discrepancies in the balance sheet of the brokerage. The Council auditors asked for more information about that. A letter from Council's audit staff dated June 1, 2018, set out requirements for production of more documents and information. On July 4, 2018, Mr. Danjou responded to that with what he described as the required information. There were problems with the completeness of that and further investigations were undertaken.
- [32] For example, the trust accounts of this brokerage have apparently not been reconciled since April 2018. At least, Mr. Danjou has not provided evidence of such reconciliation to the Council's audit staff, although pressed for that in recent months. The auditors from Council had been actively doing so well into July 2018, when the events involving the arrest and detention of Mr. Danjou occurred. Those matters could also be the subject of disciplinary proceedings. On July 24, 2018, Council auditors attended at the Proact Realty offices and interviewed Mr. D. He advised that he had last seen Mr. Danjou on July 20, 2018. He had tried calling him on July 23, 2018, but without success and could not leave any voicemail as that service indicated that the message box for Mr. Danjou was full.
- [33] Mr. D. asked the Council auditors what to do with a couple of late delivered July rent cheques. They had apparently come in on July 15, 2018, although due on July 1, 2018. Council auditors told Mr. D that he was not authorized to deal with those. To reiterate, his licensing did not include property management services.
- [34] As noted, however, while troubling, the poor record keeping by this brokerage and Mr. Danjou is not by itself perhaps a sufficient basis for an order to be made in urgent circumstances. But the lack of adequate record keeping accentuates and heightens the concerns for the safety and protection of the public and of clients. So too does the fact that the inattention to the business of the brokerage appears to have been ongoing for more than just the period since July 20, 2018, when Mr. D last saw Mr. Danjou.
- [35] Mr. D drew to the attention of the Council auditors when they visited on July 24, 2018, that the second batch of rent cheques received were supposed to be processed and money remitted to property owners by July 25, 2018. Yet Mr. Danjou was not present to do that and no one had authority to fill in while he was absent. Also, the audit disclosed that one rental property was vacant. Obviously, addressing a vacancy is one of the key roles of a property manager and there are at least questions whether Mr. Danjou was on top of that responsibility.
- [36] The matter of financial responsibility does not end with there being no evidence at present at least of any misappropriation. While I was not given figures on how great the sums might be, it is a fair inference that having 170 rental properties to manage leads inevitably to large sums of money being processed through the accounts maintained with the financial institution that Proact Realty deals with.

- [37] Thus, the combination of factors, including the record keeping issues, the small size of the brokerage and the lack of others qualified and licensed to provide replacement services, the fact that Mr. Danjou is the only managing broker and has been unavailable to attend to his duties to be engaged in active management and supervision on an ongoing basis, plus the fact that that same unavailability means that property management services are also not getting done, all justify proceeding. These are, as RESA states, urgent circumstances.

ANALYSIS

Overview

- [38] Before it has jurisdiction to make any order under section 45(2), the Committee must find that the factors set out in section 45(1) have been established. As noted at the outset, the Committee finds that they are. The three factors stated in section 45(1) of RESA are satisfied in this case. I will set out each of those in turn and the reasons for those findings.

Approach to orders in urgent circumstances

- [39] In assessing evidence, the Committee does not make “final” findings of fact. Investigations are ongoing, and any “final” determinations must occur through a discipline hearing, or through admissions. This Committee engages in a “provisional” assessment of evidence, so that it may consider, among other things, if “there has been conduct in respect of which a discipline committee could make an order under section 43 [discipline orders] against a licensee,” under section 45(1)(a) of RESA.
- [40] The BC Court of Appeal considered the proper approach for interim measures by self regulating professions under the *Health Professions Act*, RSBC 1996, c 183 (the “HPA”), in *Scott v College of Massage Therapists of British Columbia*, 2016 BCCA 180. In that case, section 35 of the HPA authorized an inquiry committee to take “extraordinary” action “necessary to protect the public during the investigation of a registrant or pending a hearing of the discipline committee....”
- [41] The court approached section 35 of the HPA as involving two separate questions: the strength of the case supporting the index allegations, and the case for immediate risk of harm to the public. Accordingly, a committee could act where satisfied “there is a prima facie case supporting the index allegations, and that having regard to such material as is put before it by the registrant, the public requires protection through an interim order” (at paragraph 81).
- [42] In substantially adopting the approach of the English Court of Appeal in *Perry v Nursing and Midwifery Council*, [2013] EWCA Civ 145, the court in *Scott* clarified that a “prima facie case” is one which if believed, is complete and sufficient to justify a verdict in a complainant’s favour in the absence of an answer (at paragraph 80). Where a registrant has tendered evidence, a committee is not required to consider the registrant’s evidence as to whether the substantive allegation is or is not well founded; the committee is only required to consider any evidence establishing that an allegation is manifestly unfounded or manifestly exaggerated (at paragraph 75). The committee is not to engage in a “mini-trial” of the index allegations (at paragraph 81).

Conduct in respect of which “a discipline order could make an order”

- [43] Section 43 of RESA provides that after a discipline hearing, the discipline committee must act under section 43 if it determines that the licensee has committed professional misconduct or conduct unbecoming a licensee. Sections 35(1), (2) and (3) of RESA set out the conduct that will amount to professional misconduct or conduct unbecoming a licensee.
- [44] Ms. Gossen submits that the evidence establishes that Mr. Danjou and Proact Realty have committed professional misconduct contrary to section 6 of RESA and Rule 3-1 in that they have not been providing services as a managing broker or with a managing broker engaged in active supervision as required. As well, it appears that the timely provision of property management services to clients has not been made and it appears that, absent Council intervention, failure will continue to the prejudice of the clients involved.
- [45] The evidence bears all that out.
- [46] I am mindful of the possibility that Mr. Danjou may be released on bail as at August 2, 2018, and the even less likely prospect that in doing so he would be released without conditions that would impede his ability to fulfill the responsibilities of a managing broker and the responsibilities of a property manager of 170 properties. I regard that as unrealistic, however.
- [47] In any event, the evidence discloses that for at least the past week he has not been spending time, paying attention to and discharging the duties required as managing broker and as a property management licensee. That is obviously going to continue being the case likely for several more days, if not longer.
- [48] The clients that Mr. Danjou and Proact Realty have are not obliged to wait on such a possibility. They are entitled to service on an ongoing basis. The public interest requires that service be accompanied by supervision and active management from a managing broker. None of that has been happening recently and it is clear that lapse will continue for at least some time more.
- [49] The public interest requires that clients be protected. Matters cannot be put on hold while Mr. Danjou sorts out the serious challenges that he now faces. It would be contrary to the best interests of the public to allow this situation to continue. It would undermine public confidence in the real estate industry and its regulation. It would bring the real estate industry into disrepute.
- [50] Given his current unavailability and the lack of any successor or coverage planning or arrangements, it falls to the Council to move to protect the public and the clients of Proact Realty.

Urgent Circumstances

- [51] The length of time that would be required to hold a discipline hearing in this case would be detrimental to the public interest. It is likely that it will take months, if not a year or more, to have this case prepared for hearing both by counsel for Council and counsel for Mr. Danjou and Proact Realty.

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- [52] That is simply too long to let this situation persist. Given the lack of any arrangements for successorship or coverage by Mr. Danjou, there is nothing “in place” that could be resorted to in the difficult circumstances that Mr. Danjou is faced with that could, at the same time, provide assurance to his clients that their interests were being protected and the job they hired Mr. Danjou and Proact Realty to do was getting done.
- [53] I was advised that the Council is applying to court for appointment of a receiver. Whether to grant such an order is for the court to decide, of course. In the circumstances, it is clear that someone should be in charge, administer the business and perform the services that Mr. Danjou and Proact Realty were engaged to do and are not providing.
- [54] As a consequence, the urgency of this matter is clear and the need for the order pronounced is as well.
- [55] Also, another consideration that militates in favour of making the order sought here is the public interest in disclosure of the kind of situation that has arisen here. If an order is made, owners of small brokerages can consider what arrangements ought to be put in place to deal with the possibility that a sole managing broker might become incapacitated, died or otherwise cease performing the obligatory level of service provided for in RESA and the Rules. The public can consider whether it should press such brokerages to make such arrangements or otherwise provide assurances for ongoing service.
- [56] If no order were made, RESA does not permit the Council to notify the public of these matters. Section 122 of RESA limits the Council’s ability to share information and records with members of the public. This is not a decisive factor for the Orders made here, but is one that reinforces the decision to make the Orders.
- [57] In addition to applying to court to have a receiver appointed, Ms. Gossen advised that the Council intends to continue its investigation and commence disciplinary proceedings. That is appropriate both in terms of ensuring the public that effective investigation and enforcement processes are followed and also because it will afford Mr. Danjou and Proact Realty with the opportunity to present their response to such proceedings in a timely manner. It may be, as well, that if circumstances change for Mr. Danjou such that he regards an application to vary the terms of the Orders may be as appropriate, he chooses to bring such an application. Obviously, any such application would have to clear the threshold issues relating to ongoing active management by a qualified managing broker and ongoing service to property management clients so that their interests were not prejudiced, but were protected and advanced.

Public Interest

- [58] The Committee finds that it is in the public interest to make the order sought.
- [59] The public is rightfully concerned to ensure effective regulation of the real estate industry and adherence to the requirements of RESA and the Rules. That includes ensuring ongoing supervision of the business of each brokerage by at least one licensed managing broker. It

also includes the provision of property management services by a licensee duly qualified for that service.

- [60] When “conduct in respect of which a discipline committee could make an order under section 43 against a licensee” is shown, when it would be detrimental to the public interest to wait until the completion of a hearing process before an order was made, and when it is in the public interest to make an order of suspension against licensees, the Committee has a discretion to exercise under section 45 of RESA.
- [61] The facts noted in these reasons establish those factors. Even after accounting for the presumption of innocence and setting aside consideration of the serious nature of the charge against Mr. Danjou, the fact remains that he and Proact Realty have not been meeting the standards required by RESA and the Rules and appear unlikely to do so in the near future, all of which operates to the prejudice of their clients and to the public interest.

CONCLUSION

- [62] For the foregoing reasons and based upon the evidence presented and submissions made by counsel for the Council, the Committee made the orders sought, including those suspending the licences of Mr. Danjou and Proact Realty effective immediately, as set out in the copy of the signed Order attached hereto.

Dated at Vancouver, British Columbia this 31st day of July, 2018.

For the Discipline Hearing Committee



Robert D. Holmes, Q.C.
Discipline Hearing Committee