IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
AND
IN THE MATTER OF
KEVINDEEP SINGH BRATCH (148527)
AND
BRATCH REALTY LTD. (X030195)

WRITTEN REASONS
FOR ORDER IN URGENT CIRCUMSTANCES

DATE AND PLACE OF HEARING:

October 30, 2017, Office of the Real Estate Council, 900-750 West Pender Street, Vancouver, BC Canada V6C 2T8

DISCIPLINE HEARING COMMITTEE:

Robert D. Holmes, Q.C.

COUNSEL FOR THE APPLICANT REAL ESTATE COUNCIL OF BC:

Sabinder Sheina

A. INTRODUCTION

1. An *ex parte* hearing was held on October 30, 2017, pursuant to sections 39 and 45(1) and (2) of the *Real Estate Services Act* ("RESA" or the "Act") by a one-person Discipline Hearing Committee ("Committee") of the Real Estate Council of BC ("Council") to consider an application by the Council for an Order in Urgent Circumstances suspending the licences of Kevindeep Singh Bratch ("Mr. Bratch") and Bratch Realty Ltd. ("Bratch Realty").

2. **Jurisdiction:** Section 45(1) of RESA provides that a discipline committee may act under this section if the committee considers that:

    a. there has been conduct in respect of which a discipline committee could make an order under section 43 against a licensee,

    b. 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

    c. it is in the public interest to make an order under this section against the licensee.

3. Under Section 45(2) of RESA, if the factors set out under section 45(1) apply, then the Committee may make certain orders, up to suspending the licences of the licensees concerned.

4. ***Ex parte* proceedings:** 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. **Evidence:** Ms. Sheina acted as counsel for the Council. She presented four exhibits:

   a. Exhibit 1 – Affidavit #1 of Carmen deFoy, sworn October 26, 2017;

   b. Exhibit 2 -- Affidavit #2 of Carmen deFoy, sworn October 26, 2017;

   c. Exhibit 3 -- Affidavit #3 of Carmen deFoy, sworn October 30, 2017; and

   d. Exhibit 4 – Affidavit of Michelle Chai, sworn October 25, 2017.

6. Ms. Sheina submitted, among other things, that Mr. Bratch and Bratch Realty have been providing real estate services without acting honestly or with reasonable care and skill, and have alternatively engaged in conduct unbecoming a licensee. The Committee read the affidavits marked as Exhibits 1-4, heard submissions from Ms. Sheina, and was satisfied of its jurisdiction to make an order under section 45(1), paragraphs (a) to (c).

7. On October 30, 2017, the Committee issued an Order in Urgent Circumstances (the "Order"), under section 45(2), immediately suspending the licences of Mr. Bratch and Bratch Realty. These are the Committee's written reasons for the Order.

B. OVERVIEW

8. In these reasons, I will refer mostly to the Licensee, Mr. Bratch, but unless the context requires otherwise, I should be taken to refer to both him and to Bratch Realty. The latter is a corporate entity licensed as a brokerage under RESA. Mr. Bratch is its managing broker. He is also a director and officer of it, and controls it.

9. The gist of the allegations here is that Mr. Bratch targeted vulnerable home-owners, namely, people experiencing financial distress, whose homes were subject to foreclosure proceedings, and who were not represented or advised by another licensee or by legal counsel. Mr. Bratch bought their homes at an under-value, on the basis that they could continue renting their homes, and opt to rebuy their homes. But the terms were highly disadvantageous, to the point of the "rent to buy" program being "predatory" in nature.

10. **Approach to orders in urgent circumstances:** 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.

11. The BC Court of Appeal considered the proper approach for interim measures by self-regulating professions under the *Health Professions Act*, R.S.B.C. 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…."

12. 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 para. 81).

13. 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 para. 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 para. 75). The committee is not to engage in a "mini-trial" of the index allegations (at para. 81).

14. **Purchase at an under-value:** Mr. Bratch engineered the purchase of the homes of vulnerable, unrepresented persons by one or more of himself, [redacted] or a numbered company owned by [redacted] (the "Buyers"). [redacted] is not a licensee under RESA, but is registered as a sub-mortgage broker.

15. Mr. Bratch prepared contracts under which the Buyers bought the homes at well under what the BC Assessment Authority ("Authority") determined to be their assessed values. While formal appraisals would be desirable, for present purposes the Committee accepts that the BC Assessment Authority valuations show the value of the properties referred to in the Exhibits as at July 1, 2016. In other words, Mr. Bratch engineered purchases of homes from people with some equity, but in financial distress and in default of their mortgages, at far less than their actual values.

16. **The "rent to own" program:** The inducement for sellers to engage in such purchase arrangements involved a "rent-to-own" scheme involving two further components:

    a. First, sellers signed agreements under which they could, in theory, exercise an option to repurchase their homes.

    b. Second, the sellers also entered into tenancy agreements at above-market rental prices.

17. A "Rent to Own Program" brochure that Mr. Bratch proffered held out such transactions as a valuable and beneficial opportunity for the sellers to "clear up any credit issues (or resolve any uncertainties)", pay rent while they did so, with some of that rent money potentially going towards the "down payment" on buying back their own home, and an option to purchase their home back within three years.

18. **Disadvantageous terms:** The language in the brochure was unclear in places, and misleading in others. The terms of the scheme were oppressive and burdensome to the sellers/tenants/option-holders. For example, while the brochure referred to options for sellers to rebuy within three years, option agreements were in fact limited to 12 months or less. The exercise of the options was also not simply a matter of sellers coming up with the repurchase prices in each option agreement; the agreements also required "that the Tenants live up to all other terms of their lease agreements with Owner/Manger [sic]." The consequences of "default" in any respect with the lease were draconian: "automatic revocation of this option."

19. Losing the option was not the only penalty in the scheme. Any "non-refundable option consideration" came out of the notional sale price. If the sellers ended up repurchasing their

own home, that money would be applied to the repurchase price. But if the sellers did not or were unable to exercise their option, or if it was subject to "automatic revocation", that part of the original sale price was lost. For unsophisticated persons, the allure of keeping their homes would likely have overshadowed the significance of the Buyers keeping part of the sale price, at least without the benefit of forthright and clear advice.

20. The documentation prepared and proffered by Mr. Bratch included a further provision that raises serious concern. The Option Agreement had a clause stating, "any recording or memorandum of the option" would result in its automatic revocation. That language is something to conjure with, but appears to mean that any attempt to register the option in the Land Title Office, either directly or by a "memorandum" of what it provided, would mean that the option was automatically revoked. The purpose of that could not have been to benefit the sellers/tenants/option-holders. The *Land Title Act* permits registration of leases, options and rights to purchase, has provisions affecting the rights of parties to such agreements, and has provisions affecting the rights of persons who have not registered their interests. The provision Mr. Bratch included in the Option Agreement is one aimed at enforcing secrecy, or else rights are lost. It was designed to prejudice the rights and interests of the sellers/tenants/option-holders. For that to take place when they were in vulnerable circumstances, wanted to preserve their home, and were not being advised independently, raises serious questions about Mr. Bratch's conduct.

21. For example, in one case the Buyers bought a property in Maple Ridge worth $603,000 (as of a date within a couple of months of the purchase and sale transaction) for a notional amount of $400,000 (or at $203,000 under-value). But $30,000 of that stayed with the purchaser -- a numbered company owned by [redacted]. The sellers only received $370,000, and the Land Title Office documents show that the numbered company gave a "Declared Value" for the purchase of $370,000. The difference became the equity of the Buyers, unless the sellers could maintain and exercise their option right. Within a few months, Mr. Bratch and [redacted] had the numbered company transfer the property to their names, with a new Declared Value of $426,000. All of this occurred in the late spring and summer of 2016, one of the most robust real property markets that the Lower Mainland of British Columbia has experienced.

22. The sellers avoided foreclosure proceedings and thought they could remain in their family home. But to exercise their option right, the sellers had to pay rent, without default, and repay $400,000 within 12 months. A "Rent to Own Program" brochure represented the scheme in this way:

    a. After clearing up their "credit issues" from the foreclosure, sellers would have three years to "obtain a mortgage and purchase the home using the down payment earned throughout the program." An example was given suggesting that "if the house appreciates at just 12% per year", the future value would make all that easier. Later representations set out that they would "enjoy the benefits of owning your home *before* you technically ever buy it!"

    b. Further, the brochure encouraged investing further in the property as "Because you may own this property soon, any improvement you do that increase the value of the property may help you build more equity for yourself."

    c. If there were repairs required, Mr. Bratch's brochure said, "Another benefit is that during the three-year lease, we are responsible for all major repairs in the home saving you any unexpected large repair bills!"

23. In this example, the benefits held out by Mr. Bratch did not come to pass for the sellers. The sellers were alleged to have missed a monthly rental payment. When they wished to exercise their option to repurchase months later, Mr. Bratch denied this right, on the basis that their "default" in that one respect eliminated their right to repurchase their home. That matter is now in litigation. Whatever the outcome of those proceedings may be, the question of Mr. Bratch's conduct is a matter of concern for the Council.

24. The Council is aware of at least two instances in which Mr. Bratch carried out the "rent to own" scheme. But the Council has knowledge of at least seven other transactions in which Mr. Bratch may have engaged in similar conduct, although the Council has not yet fully investigated those other transactions.

25. In the interests of delivering these reasons promptly, the Committee has summarized key information below, and set out its views about the conditions for an Order in Urgent Circumstances under section 45(1) of RESA.

26. The Council gave information to the Committee through a narrative of its investigation, which started after an October 15, 2017 article described how Mr. Bratch was evicting an elderly couple from their home on Thanksgiving Day, after they entered a "rent to own" agreement with a realtor, namely Mr. Bratch. The following summary of evidence is arranged topically.

C. THE EVIDENCE

27. Mr. Bratch has been licensed as a managing broker with Bratch Realty since September 12, 2011. (deFoy #1, Ex. B)

28. Mr. Bratch is also a registered sub-mortgage broker (deFoy #1, para. 5) with a company called B[redacted] M[redacted] C[redacted]., of which he is the sole director (deFoy #1, para. 5 and Ex. C). [redacted] ("Ms. T[redacted]"), is not licensed with the Council, but is registered as a sub-mortgage broker at B[redacted] M[redacted] C[redacted]. (deFoy #1, para. 5 and Ex. D)

29. Mr. Bratch came to the Council's attention after a news article of October 15, 2017. (deFoy #1, para. 2 and Ex. A (news article)) The article was about an elderly couple in Maple Ridge (the "G[redacted]"). According to the article, they were caring for someone with a disability and experienced financial problems. After a bank started foreclosure proceedings on their home (the "G[redacted] Home"), they had entered a "rent to own" arrangement with Mr. Bratch. The article alleged that Mr. Bratch evicted the G[redacted] after they failed to pay rent for several months. The G[redacted] accused Mr. Bratch of "predatory lending". (deFoy #1, paras. 2-3 and Ex. A) The Council has acted quickly, having sought its order from the Committee on October 30, 2017.

1. The G[redacted] (Maple Ridge)

30. The BC Assessment Authority has assessed the value of the G[redacted] Home at $603,000, as of July 1, 2016. (deFoy #1, Ex. K)

31. Although the evidence does not include a "Rent to Own Program" brochure specifically relating to the G[redacted] Home, I infer that Mr. Bratch likely provided or showed to the G[redacted] a brochure substantially similar to the brochure he gave to the B[redacted]. The details of this brochure are set out further below. The two arrangements occurred in about the same time period, only a few months apart. Furthermore, as set out below, the G[redacted] entered an option agreement that provided them with a credit of $500 per month of rent, up to a maximum of $6,000, if they exercised their option to repurchase the G[redacted] Home. These figures correspond to one of the

"programs" set out in the brochure that Mr. Bratch gave to the B[redacted]. I infer that he provided substantially the same brochure to the G[redacted].

32. The G[redacted] entered a contract of purchase and sale for the G[redacted] Home dated April 26, 2016 ("Contract 1") with 1[redacted] B.C. Ltd. ("362 Co.") (deFoy #1, Ex. E):

    a. The sole director of 362 Co. is Ms. T[redacted] (DeFoy #1, para. 8 and Ex. F).

    b. The purchase price for the G[redacted] Home was $370,000. (deFoy #1, Ex. E, p. 1)

    c. The deposit was paid to Bratch Realty in Trust.

    d. Contract 1 was conditional on the G[redacted]s entering into a tenancy agreement. (deFoy #1, Ex. E, p. 2)

    e. The G[redacted] were not represented in the transaction. Mr. Bratch acted as agent for 362 Co. (deFoy #1, Ex. E, p. 5)

    f. A "Working with a Realtor" brochure indicated a "customer" relationship between the G[redacted]s and Mr. Bratch pursuant to which Mr. Bratch could provide services to the G[redacted]. (deFoy #1, Ex. E)

    g. A disclosure form indicated that Ms. T[redacted] was [redacted]. (deFoy #1, Ex. G)

33. The G[redacted] also entered into an option agreement dated May 6, 2016 ("Option Agreement 1") with 362 Co. (deFoy #1, Ex. H):

    a. Option Agreement 1 stated that the G[redacted] had a right to purchase the G[redacted] Home during the following 12 months for a fixed price of $400,000. (deFoy #1, Ex. H)

    b. Option Agreement 1 stated that the G[redacted] had paid $30,000 as a non-refundable option consideration.

    c. If the G[redacted] exercised their option, the $30,000 would be applied towards their purchase of the G[redacted] Home, but otherwise the money would remain with 362 Co. (deFoy #1, Ex. H)

    d. Option Agreement 1 stipulated that "A default by Tenants of the lease agreement at any point during this term will result in an automatic revocation of this option." (deFoy #1, Ex. H)

    e. Option Agreement 1 stipulated that, "The recording of this option or any memorandum thereof will result in the automatic revocation of this option, and all monies paid to Owner by Tenants shall be retained by Owner as liquidated damages." (deFoy #1, Ex. H)

    f. No clause indicated that the G[redacted] had sought independent legal advice. (deFoy #1, Ex. H)

34. The G[redacted] also entered into a residential tenancy agreement ("Tenancy Agreement 1") with Ms. T[redacted] (deFoy #1, Ex. L):

    a. Tenancy Agreement 1 was for a one-year term. (deFoy #1, Ex. L)

    b. Tenancy Agreement 1 set a rent of $2,500 per month. (deFoy #1, Ex. L)

35. As noted above, concurrent with Mr. Bratch acting as an agent for 362 Co., Mr. Bratch was also in a "customer" relationship with the G[redacted]. The "Working with a Realtor" brochure sets out that a Licensee may still provide real estate services to customers:

> In this situation, the REALTOR® is not permitted to recommend or suggest a price, negotiate on your behalf, inform you of their client's bottom line price point or disclose any confidential information about their client unless otherwise authorized by the client (or if in special circumstances, the law required it). However, the REALTOR® can provide you with other services, such as:
>
> - Explaining real estate terms, practices and forms
> - Assist in screening or viewing properties
> - Prepare and present all offers and counter offers at your direction
> - Inform you of lenders and their policies
> - Identify and estimate costs involved in a transaction

36. On or around August 19, 2016, 362 Co. transferred fee simple in the G[redacted] Home to Mr. Bratch and Ms. T[redacted] personally. (deFoy #1, Ex. J; deFoy #2, Ex. J, p. 13)

37. According to Ms. G[redacted], in late 2016, some confusion arose about the G[redacted] delivering cash as payment of rent money, and Mr. Bratch served the G[redacted] with a 10-day Notice to End Tenancy. (deFoy #2, Ex. J (B[redacted] G[redacted] affidavit, para. 11)) The notice of cancellation was later cancelled by the Residential Tenancy Branch. (deFoy #2, Ex. J) However, upon the G[redacted] attempting, on or around April 26, 2017, to exercise their rights under the Option Agreement (deFoy #2, Ex. J), Mr. Bratch and Ms. T[redacted] asserted that the G[redacted]' failure to comply with the lease precluded them from exercising their option. (deFoy #2, Ex. J).

2. D[redacted] and B[redacted], or the B[redacted] (Pitt Meadows)

38. An investigation revealed that Mr. Bratch, Ms. T[redacted] and 362 Co. collectively owned seven properties. (deFoy #1, para. 18 and Ex. M) One of these properties was a Pitt Meadows property (the "B[redacted] Home") previously owned by a common law couple, Ms. K[redacted] D[redacted] and Mr. F[redacted] B[redacted] (for simplicity the "B[redacted]"). (deFoy #2, Ex. A and Ex. B)

39. The B[redacted] had defaulted on their mortgage. While in foreclosure proceedings brought by S[redacted] M[redacted] C[redacted], the B[redacted] had an opportunity to redeem the B[redacted] Home by August 22, 2016 by paying approximately $574,000 plus interest. (deFoy #2, Ex. A)

40. The BC Assessment Authority has assessed the value of the B[redacted] Home at $869,000 as of July 1, 2016. (deFoy #1, para. 20 and Ex. O)

41. Mr. Bratch provided the B[redacted] with a one-page brochure entitled "RENT TO OWN PROGRAM" (the "Brochure"). (deFoy #2, Ex. C):

    a. The Brochure describes the program as "a three-year lease providing you with the option to buy the home. Many people use the three years to clear up any credit issues (or resolve any uncertainties). At the end of the three years, you can obtain a mortgage and purchase the home using the down payment earned throughout the program. […] Another benefit is that during the three-year lease, we are responsible for all major repairs in the home saving you any unexpected large repair bills!"

    b. The Brochure provided a chart with three "programs":

        i. a "no" savings program;

ii. a “gold” savings program; and

iii. a “super” savings program.

c. Based on an alleged current value of $765,000 for the B[redacted] Home, each program option set

i. an “upfront payment” of $50,000;

ii. a purchase price of $833,850, and

iii. different monthly rents – $4,000, $4,100 and $4,300 – resulting in an amount of “Total Down Payment Earned” for each program (namely $0, or $200 per month of rent up to $2,400, or $500 per month of rent up to $6,000).

d. The Brochure set out “SIX REASONS RENT TO OWN WORKS FOR YOU”:

> “1) Down Payment Credits: Each month a big chunk of your rent could get credited toward the possible purchase of your home, allowing you to build equity in your home faster than with a traditional mortgage – no more wasting all of your rent money.
>
> “2) Improving Your Property: Because you may own this property soon, any improvements you do that increase the value of the property may help you build more equity for yourself.
>
> “3) No banks to deal with – no more bank hassles!
>
> “4) Own Your Own Home: You enjoy the benefits of owning your home *before* you technically ever buy it!
>
> “5) Flexibility: You have total flexibility: You have the option to buy your home, not the obligation!
>
> “6) Your Credit: You are creating a strong credit reference while you are renting to own!”

42. The B[redacted] entered a contract of purchase and sale for the B[redacted] Home dated July 14, 2016 (“Contract 2”) with Mr. Bratch and Ms. T[redacted] (deFoy #2, Ex. D):

a. The purchase price for the B[redacted] Home was $715,000. (deFoy #2, Ex. D, p. 1)

b. The deposit was paid to Bratch Realty in Trust.

c. Contract 2 was conditional on the B[redacted] entering into a tenancy agreement. (deFoy #2, Ex. D, p. 2)

d. The B[redacted] were not represented in the transaction. Mr. Bratch acted as agent for “the Buyer”, meaning himself and Ms. T[redacted]. (deFoy #2, Ex. D, p. 5)

43. The B[redacted] also entered into an option agreement dated September 6, 2016 (“Option Agreement 2”) with Mr. Bratch and Ms. T[redacted]. (deFoy #2, Ex. F):

a. Option Agreement 2 stated that the B[redacted] had a right to purchase the B[redacted] Home during the following 12 months for a fixed price of $833,850. (deFoy #2, Ex. F)

b. Option Agreement 2 stated that the B[redacted] had paid $50,000 as a non-refundable option consideration.

c. If the B[redacted] exercised their option, the $50,000 would be applied towards their purchase of the B[redacted] Home, but otherwise the money would remain with the buyers (deFoy #2, Ex. F)

d. Option Agreement 2 stipulated that "A default by Tenants of the lease agreement at any point during this term will result in an automatic revocation of this option." (deFoy #2, Ex. F)

e. Option Agreement 2 stipulated that, "The recording of this option or any memorandum thereof will result in the automatic revocation of this option, and all monies paid to Owner by Tenants shall be retained by Owner as liquidated damages." (deFoy #2, Ex. F)

f. No clause indicated that the B[redacted] had sought independent legal advice. (deFoy #2, Ex. F)

44. The B[redacted] also entered into a residential tenancy agreement ("Tenancy Agreement 2") with Mr. Bratch and Ms. T[redacted]. (deFoy #2, Ex. E)

a. Tenancy Agreement 2 was for a one-year term ending September 30, 2017. (deFoy #2, Ex. E)

b. Tenancy Agreement 2 set a rent of $4,300 per month. (deFoy #2, Ex. E)

3. The M[redacted] (Burnaby)

45. Court records show that Mr. Bratch and Ms. T[redacted] have sued C[redacted] M[redacted], the executor of the estate of B[redacted] M[redacted], the latter of whom owned a property in Burnaby (collectively the "M[redacted]"). The action is to enforce a contract of purchase and sale for a property in Burnaby (the "M[redacted] Home").

46. The BC Assessment Authority has assessed the value of the M[redacted] Home at $2,175,700 as of July 1, 2016. (deFoy #1, para. 22 and Ex. Q)

47. According to the pleading, the M[redacted] defaulted on their mortgage, and in foreclosure proceedings brought by the [redacted], the M[redacted] had an opportunity to redeem the M[redacted] Home by July 19, 2017, by paying approximately $450,000 plus interest. (deFoy #1, Ex. P)

48. According to the pleading, the M[redacted] (or B[redacted] M[redacted] alone) entered a contract of purchase and sale for the M[redacted] Home dated July 17, 2017 ("Contract 3") with Mr. Bratch and Ms. T[redacted]. (deFoy #1, Ex. P (Part 1, para. 6))

a. The purchase price was $500,000. (deFoy #1, Ex. P (Part 1, para. 6))

b. The evidence does not include Contract 3, but I have inferred from the behaviour of Mr. Bratch with respect to the G[redacted] and the B[redacted] that Contract 3 was conditional on the M[redacted] entering into a tenancy agreement.

49. According to the pleading, the M[redacted] (or alternatively, C[redacted] S[redacted] M[redacted] alone) entered an option agreement on or about July 17, 2017 ("Option Agreement 3") with Mr. Bratch and Ms. T[redacted]. (deFoy #1, Ex. P (Part 1, paras. 15-17)) This pleaded fact corresponds to a signed copy of Option Agreement 3, dated July 17, 2017 that provided for an option to repurchase within *four* months (deFoy #1, Ex. R):

a. Option Agreement 3 stated that, "the Tenant, C[redacted] M[redacted]" had a right to purchase the M[redacted] Home during the following 4 months for a fixed price of $600,000 (deFoy #2, Ex. R), which is $100,000 more than the purchase price.

b. Option Agreement 3 stipulated that, "A default by Tenants of the lease agreement at any point during this term will result in an automatic revocation of this option…." (deFoy #2, Ex. R)

c. Option Agreement 3 stipulated that, "The recording of this option or any memorandum thereof will result in the automatic revocation of this option, and all monies paid to Owner by Tenants shall be retained by Owner as liquidated damages." (deFoy #2, Ex. R)

d. Option Agreement 3 includes a provision that, "All parties to this Option Agreement have obtained independent legal advice pertaining to this Option Agreement." (deFoy #2, Ex. R) I decline, however, to conclude that this provision, without more, shows that the seller actually received independent legal advice, given the circumstances. In the absence of evidence of any other mortgages, the M[redacted] had about $1.7 million in equity, yet agreed to enter an arrangement whereby they would sell the M[redacted] Home for only $500,000, and could only reacquire title if they paid $600,000, within 4 months.

50. C[redacted] M[redacted] entered into a residential tenancy agreement ("Tenancy Agreement 3") with Mr. Bratch and Ms. T[redacted] (deFoy #2, Ex. S):

a. Tenancy Agreement 3 was for a four-month term, to end on December 31, 2017. (deFoy #2, Ex. S)

b. Tenancy Agreement 3 set a rent of $4,000 per month. (deFoy #2, Ex. S)

51. The Council's investigation of this matter is ongoing. (deFoy #1, para. 26)

4. Other properties

52. The Council obtained a list from the Real Estate Board of Greater Vancouver (the "Board") of Mr. Bratch 's real estate transactions from 2014 to present. (deFoy #1 para. 6 and 27, and Ex. M and T) Using that list, the Council conducted title searches on the identified properties and discovered that in five transactions, Mr. Bratch acted on behalf of [redacted] to buy the following properties in foreclosure proceedings, for prices lower than market value, and which she sold for a significant profit (deFoy #1, para. 27):

a. On September 14, 2016, Ms. T[redacted] and ST purchased a property on Albert Street in Burnaby for $330,000. The property was in foreclosure proceedings and had a certificate of pending litigation on title prior to purchase. The assessed value on July 1, 2016 was $465,100. The property was sold on October 16, 2017 for $550,000, which suggests a gross profit of at least $220,000. (deFoy #1, para. 28A)

b. On November 12, 2015, Ms. T[redacted] and ST, purchased a property on Primrose Lane in Coquitlam for $140,000. The property was in foreclosure proceedings and had a certificate of pending litigation on title prior to purchase. The assessed value on July 1, 2015 was $199,100. The property was sold on February 26, 2017 for $246,000 which suggests a gross profit of at least $106,000. (deFoy #1, para. 28B)

c. On March 24, 2016, Ms. T[redacted] and ST purchased a property on Royal Oak Avenue in Burnaby for $340,000. The property was in foreclosure proceedings and had a certificate of pending litigation on title prior to purchase. The assessed value on July 1, 2015 was $399,000. The property was sold on March 31, 2017 for $540,000 which suggests a gross profit of at least $200,000. (deFoy #1, para. 28C)

d. On September 23, 2016, Ms. T[redacted] and ASD purchased a property on 240 Street in Maple Ridge for $420,000. The property was in foreclosure proceedings and had a certificate of pending litigation on title prior to purchase. The assessed value on July 1, 2016 was $441,000. The property was sold on April 18, 2017 for $610,000 which suggests a gross profit of at least $190,000. (deFoy #1, para. 28D)

e. On May 31, 2017, Ms. T[redacted] and ASD purchased a property on Ferguson Place in Chilliwack for $575,000. The property was in foreclosure proceedings and had a certificate of pending litigation on title prior to purchase. The assessed value on July 1, 2017 was $617,000. The property was sold on October 11, 2017 for $718,000 which suggests a gross profit of at least $143,000. (deFoy #1, para. 28E)

53. The Council has not yet investigated these purchases to determine if the sellers entered into option and tenancy agreements. (deFoy #1, para. 32)

5. Pending deals for other properties

54. Bratch Realty files identified a pending deal file scheduled to complete on November 30, 2017. On October 3, 2017, Ms. T[redacted] and AD entered a contract of purchase and sale to purchase a property on Garden Grove Drive in Burnaby for $300,000. The seller is not represented. The property was in foreclosure proceedings and has a certificate of pending litigation registered on title. The assessed value of the property on July 1, 2016 was $375,000. (deFoy #1, para. 31 and Ex. LL)

55. The Council has not yet investigated this purchase to determine if the sellers entered into option and tenancy agreements. (deFoy #1, para. 32)

6. Brokerage records

56. The Council reviewed Bratch Realty's deal files, and identified ten deals completed in the fiscal year ending November 30, 2016. The number of completed deals that the Bratch Realty reported in the annual Brokerage Activity Report, which Mr. Bratch signed and submitted to the Council on behalf of Bratch Realty, was four. (Chai #1, para. 12)

57. A review of the financial documents that Mr. Bratch provided revealed that financial statements and account reconciliations were incomplete and missing. (Chai #1, para. 16).

D. ANALYSIS

58. Before the Committee may make any order under section 45(2), it must consider met the factors set out in section 45(1):

> 45(1) A discipline committee may act under this section if the committee considers that
>
> (a) there has been conduct in respect of which a discipline committee could make an order under section 43 *[discipline orders]* against a licensee,
>
> (b) 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
>
> (c) it is in the public interest to make an order under this section against the licensee.

As noted at the outset, the Committee does just that. Based on a provisional assessment of the evidence, the Committee considers the three factors in s. 45(1) of RESA met, as follows.

1. Conduct in respect of which "a discipline committee could make an order"

59. Paragraph (a) refers to section 43 of RESA. Section 43(1) of RESA states that if, after a discipline hearing, the discipline committee "determines that the licensee has committed professional misconduct or conduct unbecoming a licensee," it must make an order under section 43(2).

60. Sections 35(1), (2) and (3) of RESA set out the conduct that will amount to professional misconduct or conduct unbecoming a licensee:

a. Section 35(1) states that a licensee commits professional misconduct if the licensee, among other things,

> "(a) contravenes this Act, the regulations or the rules;" and
>
> "(g) "makes or allows to be made any false or misleading statement in a document that is required or authorized to be produced or submitted under this Act."

b. Section 35(2) states that a licensee commits conduct unbecoming a licensee if the licensee engages in conduct that, in the judgment of a discipline committee,

> "(a) is contrary to the best interests of the public;
>
> "(b) undermines public confidence in the real estate industry, or
>
> "(c) brings the real estate industry into disrepute."

c. Section 35(3) allows professional misconduct or conducting unbecoming a licensee to be attributed to a corporate brokerage, if an officer, director or controlling shareholder of the brokerage engages in such wrongful conduct.

61. Council Rule section 3-4 states that, "When providing real estate services, a licensee must act honestly and with reasonable care and skill."

62. **Professional misconduct:** Ms. Sheina submits Mr. Bratch committed professional misconduct, contrary to s. 3-4 of the Council Rules and s. 35(1)(a) of RESA, in that, while providing real estate services for the G[redacted] Home and the B[redacted] Home, he did not act honestly and with reasonable care and skill, when he:

a. targeted the sellers, vulnerable persons who were financially distressed as a result of their homes being in foreclosure proceedings;

b. purchased their properties at a price less than market value, in his name and/or [redacted] name and/or a numbered company owned by [redacted], and without the sellers having any agency;

c. made the purchase conditional on the sellers entering into a tenancy agreement with Mr. Bratch and/or [redacted] and/or a numbered company owned by [redacted];

d. had the sellers execute a document titled "Option Agreement" without any indication they sought independent legal advice;

e. included a clause in the Option Agreement that stated that all credits earned and consideration paid would be non-refundable if they did not exercise their right to the option or defaulted on their tenancy agreement; and

f. included a clause in the Option Agreement that stated any recording or memorandum of the option would result in its automatic revocation

63. Additionally, contrary to s. 35(1)(g) of RESA, he made a false or misleading statement in the Brokerage Activity Report for the fiscal year ending November 30, 2016 submitted to the Council pursuant to s. 7-7(1)(c) of the Council Rules.

64. **Conduct unbecoming a licensee:** The conduct of the Licensee may also or alternatively constitute conduct unbecoming a licensee. Ms. Sheina submitted that Mr. Bratch "committed conduct unbecoming a licensee contrary to s. 35(2) of RESA in the provision of real estate services for the G[redacted] Home and the B[redacted]r Home" as his conduct

a. is contrary to the best interests of the public,

b. undermines public confidence in the real estate industry, or

c. brings the real estate industry into disrepute.

65. **Analysis:** The June 2016 Report of the Independent Advisory Group ("IAG") is instructive in many respects in relation to the Council's regulatory function and the importance of protecting the public. For example, Recommendation 14 of the IAG's Report states that the Council should,

> "…**increase** its proactive detection and **deterrence efforts for licensees who engage in, aid, or abet aggressive marketing and sales practices that target vulnerable members** of the public." (emphasis added)

66. Recommendation 14 includes the following commentary:

> The public has a heightened distaste for any **misconduct that targets vulnerable British Columbians**, for example, new immigrants, seniors, less sophisticated real estate market participants, and unrepresented individuals.
>
> In a market where licensees are aggressively soliciting listings and transactions are completed in a matter of days, sellers do not have the benefit of a "cooling off period" for sober reflection. Licensees focused on sales volumes may add to a sense of urgency and impulsive seller behavior.
>
> In this environment, **the Council must focus** additional resources, including timely consumer alerts, **on preventing and disciplining aggressive predatory marketing practices that target vulnerable individuals.** (emphasis added)

67. By targeting vulnerable persons whose homes were subject to foreclosure proceedings, and who were unrepresented, Mr. Bratch displayed aggressive marketing and sales practices. He employed several documents engaging complex legal issues, and he knew that the sellers had and were getting no independent advice, whether from another licensee or from legal counsel. His coupling those legal documents with the promotional brochure and its references to sellers repurchasing their property, restoring their credit ratings, and preserving their homes – all the while minimizing or submerging serious risks and the trip-wires of "automatic revocation" of their "option" – appears to amount to sharp practice and/or predatory conduct.

68. Mr. Bratch offered sellers a lifeline, bailing them out of their immediate financial predicament with foreclosure proceedings, but in return, engineering the purchase of their property – whether in his name, [redacted] name or the name of a numbered company owned by [redacted] – at less than market value, using the vain hope that they could regain ownership of their property at substantially-higher prices.

69. Mr. Bratch conditioned purchases on the sellers entering tenancy agreements. No doubt that helped Mr. Bratch and [redacted] arrange for mortgage financing so that they could buy the properties. But the tenancy agreements were part of a scheme which allowed Mr. Bratch to hold out to sellers that they could remain in their homes, and regain ownership of their home through option agreements. But the terms of the option agreements were unconscionable. I use the term "unconscionable" in a colloquial sense, and not with respect to whether a court would refuse to enforce such arrangements. The issue for this Committee, and for the Council, is not whether Mr. Bratch's conduct was legal for him to engage in, as if he were any ordinary member of the public, but whether his conduct was consistent with the professional standards required of him as a licensee.

70. Mr. Bratch arranged for, and he benefitted (either directly or through [redacted]) from purchases of the G[redacted] Home and the B[redacted] Home (and possibly other properties) for prices substantially below their actual values. He arranged for the seller to pay monthly rents that were much higher than the mortgage payments Mr. Bratch and [redacted] incurred. (For example, the B[redacted] were paying monthly rent of $4,300 – almost $2,000 above the monthly mortgage payments that Mr. Bratch and his [redacted] were paying.) The sellers were notionally paying rents to make "down-payments" towards their rebuying their homes. The option agreements were, however, such that the rights of the sellers/tenants/option-holders – to recover their transferred equity, and to benefit from the "down-payments" they paid through their rents – would be extinguished if they could not exercise their options, or if they were in default of their tenancy agreements to any extent, or if they sought to register their option agreements. These provisions are draconian.

71. Furthermore, Mr. Bratch obtained these arrangements with sellers who did not have the benefit of independent advice from a licensee under RESA, or from legal counsel. The various agreements that Mr. Bratch arranged with the G[redacted] and the B[redacted] were all part of a "Rent to Own Program" described earlier. The brochure for that program offers only scant explanation of its financial and legal risks and consequences. Each purchase under the program involved a complex real property transaction, involving a sale, a tenancy, and an option- and repurchase-arrangement, with different figures applicable to the sale price, reserving a deposit therefrom, further deposit arrangements involving blended rent and deposit payments over time, different timing for exercising the option and completion of the repurchase, and provisions for losing repurchase rights in various situations. For unsophisticated buyers, an understanding of such a transaction would need independent advice from a trained professional.

72. Against everything that disfavored the sellers, there is, of course, a corresponding element that favored Mr. Bratch. He obtained significant financial gains by carrying out what amounts to an unprofessional scheme. He profited at the expense of those who were in distress.

73. **A discipline order based on professional misconduct:** The Committee considers the circumstances as involving conduct for which a discipline committee could make a discipline order, based on Mr. Bratch not meeting the standards set out in Rule 3-4, and for his making a false or misleading statement.

74. For example, while the content of the "honesty" standard under Rule 3-4 is a matter for any discipline committee that will conduct a hearing, the common law has, for some purposes, recognized that honesty is based on an objective standard. This as illustrated by the following comments of Lord Nicholls of Birkenhead, of the Judicial Committee of the Privy Council, in *Royal Brunei Airlines Sdn. Bhd. v. Tan*, [1995] UKPC 22 (P.C.) at paras. 25-27:

> [25] … Whatever may be the position in some criminal or other contexts... in the context of the accessory liability principle **acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances.** This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety.
>
> [26] However, these **subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances**. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, **he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour**.
>
> [27] **In most situations there is little difficulty in identifying how an honest person would behave.** Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries…. (emphasis added)

While this is not a case involving a taking of trust property, licensees still have a duty to act honestly, and to act with reasonable care and skill when providing real estate services, even towards people for whom they are not acting as agents. I am satisfied that a discipline committee could readily conclude that Mr. Bratch engaged in "predatory" conduct for personal gain, and acted contrary to the standard set out in Rule 3-4, on the basis that an honest licensee would not intentionally engage in or seek out schemes that he or she knew to be unconscionable, meaning arrangements involving both "inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain." See ***Harry v. Kreutziger*** (1978), 95 D.L.R. (3d) 231 (B.C.C.A.), where Mr. Justice McIntyre of the B.C. Court of Appeal accepted the factors of an inequality of bargaining power, and substantial unfairness or improvidence in a bargain, as grounds for unconscionability (at para. 15). In that same case, Mr. Justice Lambert described an unconscionable transaction alternatively as one that is "sufficiently divergent from community standards of commercial morality that it should be rescinded" (at para. 29).

75. Mr. Bratch acting to promote a "Rent to Own Program" scheme also implicates his duty to act with reasonable care and skill, as his duty to "customers" would have been tainted by his own interests, which in turn contributes to the unfairness of the bargains he pursued. At least in the case of the G[redacted], Mr. Bratch had an express "customer" relationship with them. As part of his promoting the "Rent to Own Program," he provided the G[redacted] with a purchase and sale agreement, a tenancy agreement that was a condition of the sale, and a related option agreement – all of which collectively made up a complex legal transaction. That brochure sets out matters that a licensee "can" explain and involves services that a licensee "can" provide while in a customer relationship. But in a setting, as here, where there is no independent advice, each step that the licensee takes in making representations, giving advice, explaining the transaction and forms is apt to appear to the "customer" as reliable trading services from a professional they can trust. It is the essence of professional misconduct to take advantage of that setting, particularly in a situation involving personal gain.

76. Even without a dual agency, the G[redacted] could, as "customers" of Mr. Bratch, have legitimately expected that he provide them with a fair explanation of the forms. Such a service is set out in the "Working with a Realtor" form that Mr. Bratch provided. This Committee cannot however conclude that Mr. Bratch provided such fair explanations, given his own personal interest in the transaction and the circumstances described herein. The prospect of Mr. Bratch providing real estate services to the G[redacted]s tainted by his personal interest in the transaction only increases this Committee's concerns about the G[redacted]' inequality of position, and their lack of independent advice.

77. **A discipline order based on conduct unbecoming a licensee:** Further and alternatively, the Committee also considers the circumstances as involving conduct where a discipline committee could make a discipline order based on all or any of the "conduct unbecoming" factors listed under section 35(2).

78. An express object of the Council under section 73(2) of RESA is to "(c) uphold and protect the public interest in relation to the conduct and integrity of its licensees." Under section 10 of RESA, applicants for licences must be of good reputation, suitable, and fit to be a licensee. Where licensees engage in predatory schemes for their own gain, such conduct reflects on their own predilections when acting as licensees, but also reflects poorly on the integrity of other licensees. Mr. Bratch acted as a licensee to facilitate predatory rent to own transactions that benefitted him and his [redacted], but even if he had not, he engaged in a scheme that reflects poorly on licensees.

79. Courts have discussed the harms of "conduct unbecoming" by professionals on their professions. Where a teacher expressed anti-Semitic views in various "off duty" writings, the Supreme Court of Canada upheld a finding of conduct unbecoming a teacher, on the basis that teachers "must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system." ***Ross v. New Brunswick School District No. 15***, [1996] 1 S.C.R. 825. Similarly, where a public school teacher and counsellor made discriminatory comments about homosexuals in "off duty" public writings, the BC courts confirmed that certain harms could be inferred from his conduct, including a loss of public confidence in the public school system, and a loss of respect for the teacher and for other teachers generally. ***Kempling v. British Columbia College of Teachers***, 2005 BCCA 327 (at paras. 38 and 42-46).

80. Based on the facts and policy considerations set out above, a discipline committee could readily conclude that, even if Mr. Bratch's conduct did not violate the honesty standard, licensees

engaging in the sorts of predatory practices that Mr. Bratch has been engaging in here is contrary to the best interests of the public. Furthermore, a discipline committee could also readily conclude that the kinds of serial advantage-taking in which Mr. Bratch has engaged – even if his conduct could be characterized as "off duty" conduct – undermines public confidence in licensees generally, and brings the whole of the real estate industry into disrepute. The only way to protect against that is for the regulator – the Council – to enforce the standards applicable to all licensees.

81. **The liability of Bratch Realty:** The liability of Bratch Realty follows that of Mr. Bratch. As a discipline committee could make a discipline order against Mr. Bratch, it could also make a discipline order against Bratch Realty, of whom Mr. Bratch was a director, pursuant to s. 35(3) of RESA.

2. Urgent Circumstances

82. The two primary instances noted here, namely the purchases of the G[redacted] Home and the B[redacted] Home, are not the full extent of Mr. Bratch's rent to own program. The program also includes the M[redacted] Home, and may include five other properties already sold, and one pending deal. Notably, the purchase and sale of the five other properties between November 2015 and October 2017, collectively, suggests a gross profit of at least $759,000.

83. A delay in any discipline order until the Council can complete its investigation and hold a discipline hearing would be detrimental to the public interest. It is likely, however, 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. Bratch and Bratch Realty. That is simply too long a period for Mr. Bratch to be allowed to continue his conduct, at least to the extent it has been made possible, or has been facilitated by, his status as a licensee. If the Committee does not impose an interim measure before a hearing, Mr. Bratch will be free to use his status as a licensee to continue engaging in highly profitable, unprofessional conduct.

84. Ms. Sheina advised that Council intends to continue its investigation and commence a disciplinary proceeding against Mr. Bratch and Bratch Realty as soon as possible. A timely discipline hearing would be in the public interest. Indeed, where a committee has made an interim order, Mr. Bratch may demand a disciplinary proceeding so that he may respond to the case against him.

3. Public Interest

85. The extent to which the requirements under section 45(1)(b) and (c) are distinct requirements is unclear, since a detriment to the public interest from any delay until after a discipline hearing, under paragraph (b), would seem to indicate the public interest favours an order, under paragraph (c). In any event, for the reasons set out above concerning the need for an order prior to when a discipline hearing may complete, the Committee finds that the public interest favours an order. The dominant public interest at play here is protecting the public from Mr. Bratch using his status as a licensee to facilitate rent-to-own program transactions, until the Council can investigate fully and hold a discipline hearing.

86. The Committee has concluded that the public interest requires that it suspend Mr. Bratch's licence under section 45(2)(a) of RESA. The Committee considered whether issuing conditions could suffice to protect the public, but in the end decided that would simply not work here. Mr. Bratch is the only managing broker for Bratch Realty. The significance of that cannot be overstated when considering a small brokerage like this and those involved with it. An order

that his functions as licensee be subject to "enhanced supervision" by another managing broker is not feasible. There is no other managing broker licensed with this brokerage. Given his multiple roles in trading services, as managing broker and as director and officer of Bratch Realty, the issues of dishonesty and unfitness, and the consequent need for a suspension to protect the public, affects all aspects of Mr. Bratch's roles. The same holds true concerning the notion that conditions instead of a suspension could apply to Bratch Realty.

87. There is no practical way to devise conditions that Council and the public could be reasonably confident would be adhered to. Furthermore, even if it were possible for the Committee to provide by conditions for a sort of supervisor to whom Mr. Bratch would have to report with respect to all of his work as a licensee, the issues of honesty that arise in this matter would bring into question the adequacy of any system premised on Mr. Bratch accurately and thoroughly reporting. Finally, if circumstances were to change such that the Committee could fashion conditions adequate to protect the public, it is open to Mr. Bratch to apply for this order to be varied under section 45(4).

88. The Committee is mindful that there is one other licensee whose registration with Council exists through Bratch Realty. While it is unfortunate that the order made here will cause some dislocation in that licensee's ability to practice, the Committee regards the public interest and the risk to the public as outweighing that factor.

89. Ms. Sheina submits that another consideration that favors an order under section 45(2) is the public interest in the Council disclosing the kind of practices described herein. If an order is made, she argues, the public can be warned. Section 47 requires that the Council publish a copy of each order under Division 2. If no order is made, RESA does not permit Council to notify the public of these matters. Section 122 of RESA limits Council's ability to share information and records with members of the public.

90. The Committee need not address the argument that the public's interest in disclosure is an independent ground for an order, as the Committee has sufficient other grounds to make an order, and the Council must publish that order pursuant to section 47 of RESA.

E. CONCLUSION

91. For the foregoing reasons and based upon the evidence presented and submissions made by counsel for the Council, the Committee made the order sought suspending the licenses of Mr. Bratch and Bratch Realty, effective immediately.

Dated at Vancouver, British Columbia this 14th day of November 2017.

FOR THE DISCIPLINE HEARING COMMITTEE

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