

**IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
S.B.C. 2004, c. 42 as amended
AND IN THE MATTER OF
SHAHIN BEHROYAN
AND
SHAHIN BEHROYAN PERSONAL REAL ESTATE CORPORATION**

DECISION REGARDING PENALTY

DATE AND PLACE OF HEARING: April 9, 2018
Office of the Real Estate Council
Vancouver

DISCIPLINE HEARING COMMITTEE: Barry Long, Chair
Len Hrycan, Committee Member

ALSO PRESENT: Jean P. Whittow Q.C. – Solicitor for the Real Estate Council
John Shields - Solicitor for the Respondent
Shahin Behroyan - Respondent

I - INTRODUCTION

- [1] For the reasons set out in the decision regarding liability of October 30, 2017, this discipline hearing committee found that Shahin Behroyan committed professional misconduct within the meaning of s. 35 of the *Real Estate Services Act*, SBC 2004, c. 42 ("*RESA*").
- [2] In summary, we found that Mr. Behroyan caused his client, HG, to pay him a \$75,000 bonus by falsely stating that the agent of prospective purchasers of his property would not present a full price offer for sale unless he first agreed to pay a bonus. We also found that Mr. Behroyan failed to disclose that he had acted for the purchasers in the recent sale of their home, failed to disclose that the purchaser's agent had agreed to split her commission with him, and failed to adequately advise HG to obtain independent legal advice.
- [3] These findings led the committee to conclude that Mr. Behroyan had committed professional misconduct that included deceptive dealing, breach of his duty to act honestly, failure to act in his client's best interest and/or avoid conflicts of interest, failure to advise his client to obtain independent legal advice.

II - COMPOSITION OF HEARING COMMITTEE

- [4] In the time interval between the liability decision of October 30, 2017 and the penalty hearing of April 9, 2018, one of the members of the committee developed serious medical illness and was unable to participate in the penalty hearing. In the circumstances, the committee determined that it would continue with the two remaining members pursuant to S. 83 (3) of the RESA, which provides:

If a hearing committee member is unable for any reason to continue to serve on the hearing committee after a hearing has been commenced, the vacancy does not invalidate the proceedings and the remaining members may continue the hearing and exercise the powers of the hearing committee.

- [5] There was no objection from the parties to the jurisdiction of the committee to continue in such circumstances.

III - SUBMISSIONS

RECBC

- [6] Ms. Whittow, on behalf of the RECBC, submitted that Mr. Behroyan had committed fraud in obtaining the \$75,000 bonus. She argued that the Respondent's fraud combined with other misconduct justified a severe penalty.
- [7] Ms. Whittow submitted that the committee should:
- cancel Mr. Behroyan's licence;
 - impose a five-year prohibition from reapplying for a license;
 - require Mr. Behroyan to complete an ethics course at his own expense prior to reapplying for a license;
 - impose a fine of \$10,000; and
 - order the payment of enforcement expenses.

MR. BEHROYAN

- [8] Mr. Shields, on behalf of Mr. Behroyan, submitted that the Respondent should be reprimanded. He argued that the penalty should be mitigated by multiple factors that included that:
- there was no misappropriation of funds or fraud;
 - the misconduct was not criminal or quasi-criminal;
 - Mr. Behroyan had renounced any claim to the \$75,000 bonus;
 - an absence of serious harm;
 - Mr. Behroyan's youth and relative inexperience at the time of the misconduct;

- Mr. Behroyan's lack of a disciplinary history; and
- the short duration of the misconduct;

IV - ANALYSIS

- [9] The principles guiding the imposition of penalty in RECBC disciplinary proceedings were outlined the Commercial Appeals Commission in *Wong v. Real Estate Council of BC*, C.A.C., July 25, 2003 as follows:

We accept for present purposes the appellant's reliance on principles governing sentencing under the *Criminal Code*. As set out in *R. v. Hinch and Salanski* (1967), 62 W.W.R. 205 (B.C.C.A.), there are four considerations: (1) the safety of the public; (2) the deterrent effect of a sentence; (3) punishment of the offender; and (4) reformation and rehabilitation of the offender (p. 209). However, it is also beyond dispute that the primary purpose of legislation governing professional bodies is protection of the public: James T. Casey, *The Regulation of Professionals in Canada* (Carswell: 2001), at p. 14-4. Thus in determining the appropriate penalty in professional discipline cases, "the emphasis must clearly be upon the protection of the public interest": *McKee v. College of Psychologists (British Columbia)*, [1994] 9 W.W.R. 374 (B.C.C.A.), p. 376.

- [10] The many factors to be considered in assessing penalty were helpfully consolidated in *Law Society of British Columbia v. Dent*, 2016 LSBC 05 as follows:

Nature, gravity and consequences of conduct

[20] This would cover the nature of the professional misconduct. Was it severe? Here are some of the aspects of severity: For how long and how many times did the misconduct occur? How did the conduct affect the victim? Did the lawyer obtain any financial gain from the misconduct? What were the consequences for the lawyer? Were there civil or criminal proceedings resulting from the conduct?

Character and professional conduct record of the respondent

[21] What is the age and experience of the respondent? What is the reputation of the respondent in the community in general and among his fellow lawyers? What is contained in the professional conduct record?

Acknowledgement of the misconduct and remedial action

[22] Does the respondent admit his or her misconduct? What steps, if any, has the respondent taken to prevent a reoccurrence? Did the respondent take any remedial action to correct the specific misconduct? Generally, can the respondent be rehabilitated? Are there other mitigating circumstances, such as mental health or addiction, and are they being dealt with by the respondent?

Public confidence in the legal profession including public confidence in the disciplinary process

[23] Is there sufficient specific or general deterrent value in the proposed disciplinary action? Generally, will the public have confidence that the proposed disciplinary action is sufficient to maintain the integrity of the legal profession? Specifically, will the public have confidence in the proposed disciplinary action compared to similar cases?

[11] We next applied this framework for analysis to Mr. Behroyan's conduct.

Nature, gravity and consequences of conduct

[12] The Supreme Court of Canada, in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 (CanLII) at par. 21, held that the tort of civil fraud was composed of four elements:

- (1) a false representation made by the defendant;
- (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);
- (3) the false representation caused the plaintiff to act; and
- (4) the plaintiff's actions resulted in a loss.

[13] In applying this test to the Respondent's actions we found that:

(1) false representation

Mr. Behroyan told HG that the agent for the purchaser of his property would not present a full price offer unless he agreed to pay a bonus of \$75,000 to the purchaser's agent. This was not true.

(2) knowledge of falsehood

Mr. Behroyan knew that this representation was false. There was no evidence that the purchaser's agent had made this demand. In fact Mr. Behroyan has consistently acknowledged that the bonus was for himself and was offered by HG.

(3) false representation caused plaintiff to act

HG agreed to pay the bonus in order to complete the sale of the property.

(4) loss

The \$75,000 was held in trust after HG formally objected to the payment of the bonus prior to the completion of the sale. The money remains tied up in trust pending the resolution of the civil action brought by HG against Mr. Behroyan. That money has been lost to HG until Mr. Behroyan's renunciation of his claim to the funds following the Committee's decision on liability.

- [14] We therefore had little difficulty concluding that Mr. Behroyan's misconduct fell squarely within the definition of civil fraud.
- [15] There can be little doubt that fraud constitutes one of the most serious forms of professional misconduct. The amount of money that Mr. Behroyan attempted to obtain was significant. He would have succeeded had HG not formally objected prior to the completion of the sale and subsequently commenced legal proceedings.
- [16] Significantly, Mr. Behroyan's misconduct was not confined solely to the fraud. He failed to advise HG that he had acted for the purchasers in the sale of their property, failed to disclose that the purchaser's agent had agreed to split her commission with him, and failed to adequately advise HG to obtain independent legal advice. It is probable that Mr. Behroyan committed this misconduct in order to advance the fraud, as had he made disclosure about his relationship with the purchasers, the split commission, and advised HG to obtain independent legal advice, HG might have been become suspicious.
- [17] On the other hand we acknowledge that Mr. Behroyan is facing additional consequences from the civil proceedings. We accept that his misconduct was confined to a short time span.

Character and professional conduct record of the respondent

- [18] Mr. Behroyan is young and had been an agent for about five years at the time of the misconduct. He does not have any other disciplinary record. There have been no further complaints against him in the approximate three years since the misconduct.
- [19] Mr. Behroyan filed four letters attesting to his character. Two of the letters failed to express any awareness of the fact that he had been found to have committed professional misconduct. One of the other letters was from his employer. The remaining letter was from the owner of a motor vehicle that Mr. Behroyan hit while it was parked. He was grateful that Mr. Behroyan had left his name and accepted responsibility for the accident instead of committing a hit-and-run. On the whole we found the letters to be of limited assistance.

Acknowledgement of the misconduct and remedial action

- [20] Mr. Shields advised the committee that following the decision on liability, Mr. Behroyan gave up his claim to the bonus. He stressed that this was an important mitigating factor.
- [21] We note that Mr. Behroyan's decision occurred some three years after the events and only after we rejected his evidence in the liability hearing and found that he had committed professional misconduct. Significantly, the civil case remains unsettled. At this stage in the civil proceedings, the plaintiffs are no doubt entitled to substantially more than a bare relinquishment of the bonus. As Ms. Whittow observed, Mr. Behroyan has not made the plaintiffs "whole" as a consequence of his misconduct. In short, we found that Mr. Behroyan's decision to give up the bonus is too little and comes too late

to significantly assist him in these proceedings. Mr. Behroyan cannot undo the fraud by renouncing his claim to the bonus more than three years after the events.

- [22] Mr. Shields submitted that Mr. Behroyan has advised him that he is "contrite, apologetic, remorseful, and embarrassed". However, Mr. Behroyan did not provide any testimony at this hearing to substantiate Mr. Shields submission. In the absence of any evidence to support this submission, we found that Mr. Behroyan has not meaningfully acknowledged his misconduct.

Public confidence in the profession including public confidence in the disciplinary process

- [23] In *McGuire v. The Law Society of British Columbia*, 2007 BCCA 442, the Court of Appeal affirmed a Law Society decision to disbar a lawyer who had repeatedly misappropriated trust funds. The reason quoted the following passage from the discipline panel decision:

...[24]... Wrongly taking a client's money is the plainest form of betrayal of the client's trust. In our view, the public is entitled to expect that the severity of the consequences reflect of the gravity of the wrong. Protection of the public lies not only in dealing with ethical failures when they occur, but also in preventing ethical failures. In effect, the profession has to say to its members, "Don't even think about it." And that demands the imposition of severe sanctions for clear, knowing breaches of ethical standards. A penalty in this case of a fine and a practise restriction is, in our view, wholly inadequate for the protection of the public in the larger sense. (emphasis added)

- [24] This authority supports the argument that cancellation of Mr. Behroyan's licence is necessary to maintain public confidence in the real estate profession following a fraud of this magnitude.
- [25] We have taken into account the Report of the Independent Advisory Committee, On Conduct and Practices in the Real Estate Industry in British Columbia (June 2016), which stated: "Alleged misconduct, combined with the perception that the Real Estate Council is unable or unwilling to take strong action to address it, has resulted in a loss of public trust". The Report found that the failure of licensees to identify and address conflicts was a public concern, causing some to put "their own interests ahead of those of their clients".
- [26] In all the circumstances, including the need for general and specific deterrence, the foregoing authorities, and the factors set out in *Dent*, we concluded that a significant penalty was warranted to adequately reflect the seriousness of Mr. Behroyan's misconduct.

PENALTY

- [27] It has been suggested that revocation of a registrant's ability to engage in their chosen profession is the most severe sanction available and should only be reserved for the

most serious of misconduct. However, this principle was held to be inapplicable to the legislative scheme under RESA in *Re Parsons*, FST Decision No. 2015-RSA-002(d):

[91] Licence cancellation is the most severe form of punishment available to Council under section 43 of RESA. It should, therefore, only be reserved for cases of serious misconduct. I deliberately refrain from using a phrase like “the most serious misconduct”, as I would not think that a fair interpretation of the provision. I see a qualitative difference between licence cancellation under RESA and permanent expulsion of a person from his or her profession under certain other self-regulatory regimes, such as, for example, disbarment of a lawyer or removal of a physician from the register. Such expulsions as those have permanent effect and thereby amount to capital punishment that is only warranted for capital offences, so to speak. Under RESA, however, there is an ability to both cancel a licence and expressly contemplate the re-admission of the individual on application for a fresh licence after a certain lapse of time. The cases cited on this appeal, some of which I have discussed above, show that something of a practice is in place for precisely such hybrid orders, and which practice has been at least tacitly endorsed in appellate decisions. A scan of these authorities also shows that licence cancellation has not historically been restricted only to the most serious forms of realtor misconduct, with gradations of these contraventions being accounted for in the length of the ineligibility period ordered to accompany the cancellation. Ineligibility period aside, licence cancellation should still not occur unless the misconduct is indeed of a serious character, but it need not be at or near the extreme right of the severity scale, given the ability to moderate the cancellation by permission to apply for relicensing again at a defined time in future. (Emphasis added)

- [28] Several decisions cited by Ms. Whittow, such as *Smetaniuk (Re)*, 2007 CanLII 71548 (BC REC), *Westwin Realty Ltd. (Re)*, 2010 CanLII 56277 (BC REC), and *Lalli (Re)*, 2010 CanLII 46486 (BC REC) showed that cancellation of an agent's licence was the appropriate remedy for misconduct involving misappropriation of monies or fraud.
- [29] Mr. Shields relied upon numerous penalty decisions to support his submission for a reprimand. Significantly none of the precedents relied upon by Mr. Shields involved fraud or other similar misconduct. Furthermore, many of these decisions were Consent Orders of the Real Estate Council. Such precedents were readily distinguishable as the registrants had admitted misconduct, unlike Mr. Behroyan. Overall, we found these cases to be a little assistance.
- [30] We found that there is sound precedent to support the submission that cancellation of Mr. Behroyan's licence is well within the range of an appropriate penalty. Nevertheless, we concluded that all of the objectives that guide the determination of penalty could be met through the imposition of a significant period of suspension without the necessity of cancellation of Mr. Behroyan's licence.
- [31] In considering the length of the suspension, we note the decision of *Wu (Re)* 2007 CanLII 71610 (BC REC). In this matter, the licensee admitted to deceptive dealing by creating a fictitious transaction to give the appearance of activity on the listing. However, there

was no fraud of the type that occurred here. Mr. Wu was suspended for 180 days. We found that Mr. Behroyan's misconduct was substantially more serious.

- [32] We take into account the decision in *Hassanali (Re)*, 2008 CanLII 75207 (BC REC). This matter involved undisclosed conflicts between the licensee and his clients which resulted in him elevating his interest in obtaining a commission over the best interests of his clients. Again, there was no fraud of the type that occurred in this matter. Mr. Hassanali was suspended for one year.
- [33] In all the circumstances we concluded that a suspension of one year would serve as a powerful deterrent to other members of the profession who might consider such misconduct. As well, this suspension, in combination with other aspects of the overall penalty discussed below, will be a significant deterrent to Mr. Behroyan. We are also satisfied that such a suspension will be sufficient to maintain public confidence in the disciplinary process. The suspension will begin as of June 1, 2018 in order to provide Mr. Behroyan with some time to put his professional affairs in order.
- [34] We next turned to the other elements of the penalty sought by Ms. Whittow.

FINE

- [35] The provisions of the RESA provide for a maximum fine of \$10,000. Given the seriousness of the misconduct we concluded that there should be a fine of \$7,500, to be paid within two months of this decision.

ETHICS COURSE

- [36] Ms. Whittow submitted that Mr. Behroyan should be required to complete an ethics course at his own expense. We had little difficulty agreeing that this was warranted in the circumstances. Ms. Whittow suggested a particular course: REIC 2600-Ethics In Business Practice. This seemed appropriate. In the event of logistical issues that make taking this course impractical, Mr. Behroyan may complete an equivalent course that is deemed acceptable by the RECBC. The course must be completed prior to the conclusion of the suspension period.

ENFORCEMENT EXPENSES

- [37] S. 44 of RESA provides that:
- 44 (1) A discipline committee may, by an order under section 43 (2) (h) [*recovery of enforcement expenses*], require the licensee to pay the expenses, or part of the expenses, incurred by the real estate council in relation to either or both of the investigation and the discipline hearing to which the order relates.
- (2) Amounts ordered as referred to in subsection (1)
- (a) must not exceed the applicable limit prescribed by regulation in relation to the type of expenses to which they relate, and

(b) may include the remuneration expenses incurred in relation to employees, officers or agents of the real estate council, or members of the discipline committee, engaged in the investigation or discipline hearing.

- [38] Ms. Whittow filed an affidavit of Paul Gorman, a legal assistant with RECBC, that set out enforcement expenses of \$90,069.23 that had been incurred by the RECBC. The affidavit included multiple attachments of invoices and accounts. Ms. Whittow acknowledged the invoices for legal services should be reduced to take into account repeated preparation time that was incurred when the first disciplinary hearing collapsed on short notice due to no fault of Mr. Behroyan. She conceded that it was difficult to estimate the precise degree of duplication but suggested that the account be reduced by 50 hours. She further allowed that the committee might choose to reduce the costs to take into account the fact that two of the seven allegations of misconduct brought against Mr. Behroyan were dismissed.
- [39] Mr. Shields argued that Mr. Gorman's affidavit was inadmissible because it contained multiple hearsay evidence. There was therefore no evidence upon which we could make an order an enforcement expenses. He also argued that Mr. Gorman should have been called as a witness. In the alternative, the legal bills should not be accepted because portions were redacted to protect solicitor client communications. In the absence of the redacted portions, we should reject the bills.
- [40] We note that when Ms. Whittow responded to questions from the committee about some of the objections raised by Mr. Shields, she suggested we might consider a further hearing with additional witnesses on the issue of enforcement costs. That would afford Mr. Behroyan an opportunity to further challenge the expenses. This option was strenuously opposed by Mr. Shields. He submitted to do so would be the same as permitting a party to split its case following an objection that appeared likely to succeed.
- [41] We concluded that Mr. Shields' objections were without merit and that Mr. Behroyan should pay allowable enforcement expenses in the amount set out in Mr. Gorman's affidavit subject to two reductions. The first is based on Ms. Whittow's acknowledgement that there was duplicated time caused by preparation for two hearings, which was estimated at 50 hours. This seemed reasonable. The hourly rate is \$375, leading to reduction of \$18,750 in legal fees, coming to total of \$21,000 with tax. This left the allowable enforcement expenses at \$69,069.23. We further decided to make a second reduction in light of the fact that two of the seven allegations of misconduct were not proven. However, the allegations that were not proven formed a minor portion of the alleged misconduct of the evidence adduced in the liability hearing. In the circumstances we concluded that the enforcement expenses should be reduced by a further 15%, coming to a total of \$58,708 .85. These must be paid within six months of this decision.

CONCLUSION

[42] Mr. Behroyan's licence is suspended for a period of 12 months effective June 1, 2018.

Mr. Behroyan must also:

- Pay a fine of \$7500 within two months of this decision;
- Take an ethics course as described above prior to the completion of the suspension; and
- Pay enforcement costs of \$58,708 .85 within six months of this decision.

FOR THE DISCIPLINE HEARING COMMITTEE



Barry Long
Discipline Hearing Committee Chair



Len Hrycan
Discipline Hearing Committee Member

RECBC File#14-431