

Court of Queen's Bench of Alberta

Citation: Kalia v Real Estate Council of Alberta, 2021 ABQB 950



Date:
Docket: 2103 08943
Registry: Edmonton

Between:

Sameer Kalia

Applicant

- and -

Real Estate Council of Alberta

Respondent

**Reasons for Decision
of the
Honourable Mr. Justice K.S. Feth**

[1] Sameer Kalia applies for a stay of the temporary suspension of his realtor license imposed by the Real Estate Council of Alberta (“RECA”) on May 7, 2021. The suspension is in place pending the completion of investigations into three complaints about his professional conduct and the outcome of the conduct proceedings.

[2] Mr. Kalia denies any wrongdoing and contends that the suspension is causing him irreparable harm while being unnecessary to protect the public.

[3] For the reasons to follow, the application for a stay is denied. However, permission is granted for Mr. Kalia to re-apply for a stay if the conduct proceedings have not progressed to the commencement of a hearing by March 31, 2022.

Background

[4] RECA is an independent, governing authority responsible for regulating professional standards in the real estate industry, including the conduct of real estate agents and brokers. Part of RECA's statutory mandate is to protect against, investigate, detect and suppress fraud and to protect consumers: *Real Estate Act*, RSA 2000, c R-5 at s 5.

[5] Mr. Kalia has been a realtor since 2001. He has been licensed by RECA as a real estate agent, but not as a broker.

[6] The complaints against Mr. Kalia involve commercial leases for a proposed business complex that was to be located in Edmonton. During August and September 2017, three entities each agreed to lease space in the proposed complex (the "Tenants"). Each of the Tenants entered into a lease agreement with Manning Centre Corp. ("Manning"), which was described as the landlord. Mr. Kalia served as agent for each of the Tenants and Manning under dual retainers described as "double enders."

[7] When each lease agreement was executed, the property on which the complex was to be built did not yet have the necessary municipal zoning compliance for the construction.

[8] The Tenants were apparently unaware that Manning did not own the property. Manning had entered into negotiations to purchase the property from 1174097 Alberta Ltd., but title to the property did not transfer to Manning until March 2018.

[9] Under the lease agreements, each Tenant provided a deposit that was placed in trust with Re/Max Real Estate ("Re/Max"), the real estate brokerage for which Mr. Kalia worked. The deposits were \$50,000, \$34,650 and \$21,000, respectively, and were delivered to Re/Max by September and October 2017.

[10] One of the Tenants was seeking to operate a liquor store in the business complex. The lease agreement for that Tenant was amended by an Addendum dated November 4, 2017 imposing a condition that the lease was subject to municipal license approval for a liquor store. Mr. Kalia was a signatory to the Addendum. The approval was not in place when the Tenant's deposit was delivered to Re/Max.

[11] On April 25, 2018, Mr. Kalia prepared a handwritten note to "Administration" at Re/Max stating that the business complex had "not started its construction yet" and that "all Deposits will stay in trust till we get possession of the bays and at that time transaction will be completed." The "bays" appears to refer to the leased spaces. The implication is that the deposits were being held in trust until the business complex was constructed.

[12] In September 2018, Mr. Kalia prepared an amendment document for each of the leases authorizing the deposit to be released from trust and paid to him. The amendments were signed by an unidentified representative of Manning and by Mr. Kalia, as the brokerage's representative, but no one signed on behalf of each Tenant. Each Tenant denies knowing about the amendment document.

[13] Around the same time, Manning directed that Re/Max release substantial portions of the deposits to Mr. Kalia for commissions allegedly owed to him. Mr. Kalia and the principal behind Manning apparently had a pre-existing business relationship. Mr. Kalia received the following payments from the brokerage: \$47,092.48, \$23,915.10, and \$19,750. The funds were received by his personal company, Nawaab Investments Inc. ("Nawaab Inc.").

[14] By early 2019, the business complex was not constructed and each Tenant sought the recovery of its deposit. Manning was not prepared to return the funds.

[15] Mr. Kalia contends that the deposits were received unconditionally by Manning and that Manning, on its own initiative, directed Re/Max to transfer most of the funds to Mr. Kalia's company. Moreover, he asserts that Re/Max, as the brokerage, was responsible for determining whether the deposits could properly be transferred to Nawaab Inc. While he prepared documents for Re/Max that facilitated the transfers, he was not an owner or operator of the brokerage and therefore was not responsible, in his view, for the transfer decisions.

[16] The evidence is unclear about whether each Tenant eventually recovered its deposit in full, although RECA denies they did. At least two of the Tenants commenced litigation to recover their deposits. The record does not indicate whether their litigation expenses were reimbursed. Many months passed between the Tenants' demands for the recovery of their monies and the actual return of any funds.

[17] According to RECA's Professional Conduct Review Officer, who is investigating the complaints, the lease agreements suffered from significant deficiencies that were potentially prejudicial to the Tenants. Depending on the agreement, the deficiencies included all or most of the following:

- a) Some terms were illegible;
- b) Some essential terms were not determined or ascertainable, and were merely marked as "To Be Announced", such as the rent schedule or the tenant's proportionate share of common area expenses;
- c) purchaser conditions were not inserted to protect the Tenant's interests;
- d) the actual owner of the property was not identified;
- e) amendments were made to the lease agreement without all parties signing;
- f) Manning's conditions were waived without notice of the waiver being given to the Tenant; and
- g) Manning was described by the wrong legal name.

[18] RECA's Review Officer also raises concerns that Mr. Kalia failed to inform the Tenants about the transfer of the deposit funds to him, through Nawaab Inc., and misrepresented facts to one of the Tenants so as to facilitate the release of that Tenant's deposit to Manning. Additionally, deficiencies are noted in Mr. Kalia's reporting obligations to his brokerage.

[19] RECA's Registrar, in recommending the temporary suspension, relied on ss 41 and 42 of the *Real Estate Act Rules* ("Rules"), which prescribe obligations imposed on real estate agents, including honest and competent service delivery, compliance with fiduciary duties, and disclosure of conflicts of interest to clients, while prohibiting misleading or deceptive representations, and fraud. The allegations, at least arguably, offend various responsibilities and prohibitions imposed on Mr. Kalia by the *Rules*.

[20] RECA's investigation is not complete. However, RECA's Registrar identified the preceding concerns, including fraudulent conduct, as matters warranting a temporary suspension to protect the public. The Registrar expressly recognized that the protection of the public must be

weighed against the harm to Mr. Kalia and that the regulator's temporary suspension power should be used sparingly.

[21] The Registrar also observed that Mr. Kalia has a prior disciplinary history and that similarities in the past misconduct suggest a pattern of conduct that puts the public at risk.

[22] The prior misconduct was the subject of a hearing in September 2018, following which a Hearing Panel concluded on October 10, 2018 that Mr. Kalia engaged in conduct deserving of sanction by breaching the *Rules*. The breaches can be summarized as follows:

- a) Conduct that recklessly or intentionally misled or deceived a person;
- b) Failing to fulfill fiduciary obligations to clients;
- c) Failing to disclose conflicts of interest to clients;
- d) Failing to provide, in a timely manner, all documents relating to trades in real estate to his brokerage; and
- e) Failing to make written disclosures when trading in real estate on his own behalf.

[23] Mr. Kalia was sanctioned for these breaches through a three-month suspension.

[24] On the stay application, RECA offered new concerns about Mr. Kalia's conduct after the temporary suspension was imposed. Specifically, two new matters have been reported:

- a) In July 2021, an Edmonton lawyer complained to RECA that Mr. Kalia held himself out as a real estate broker, while suspended as a real estate agent, and attempted to broker the purchase of a condominium building located in Edmonton. Mr. Kalia, through Nawaab Inc., was acting as a "go between" for a Vancouver realtor and the condominium association. He was seeking a referral fee of \$600,000. The allegation is currently under investigation. However, the lawyer provided a commercial purchase contract dated July 2021 identifying Mr. Kalia as the contact person for the brokerage. Mr. Kalia says the contract is a forgery and denies acting as a broker.
- b) During July 2021, Mr. Kalia contacted a real estate broker about the possible purchase of an apartment building. Following an investigation, RECA concluded that Mr. Kalia had requested information about the property for a client and was holding himself out as a real estate broker. RECA determined that Mr. Kalia had engaged in unauthorized practice contrary to s 17(d) of the *Real Estate Act* and imposed an administrative penalty of \$25,000. Mr. Kalia has appealed that finding.

[25] RECA submits that the new allegations show that Mr. Kalia is ungovernable and a continuing risk to the public.

[26] RECA expects its investigation into the original complaints to be completed within a few weeks. A conduct hearing, if directed, might be available by February or March 2022.

Issues

[27] The issues for determination by this Court are:

- a) Should a stay of the temporary suspension be granted?
- b) Alternatively, should a stay be granted with conditions imposed on Mr. Kalia?

Temporary suspension

[28] Section 53(1)(a) of the *Real Estate Act* authorizes the chair of an Industry Council to temporarily suspend a realtor's license or to impose conditions or restrictions pending the outcome of a conduct proceeding under the *Act*:

Temporary Order

53(1) Notwithstanding anything in this Act, the chair of an Industry Council may make an order

- (a) temporarily suspending the license of a licensee issued by an Industry Council, or
- (b) temporarily imposing conditions or restrictions on a licensee and the licensee's carrying on the business of a licensee

pending the outcome of proceedings under this Part.

[29] A temporary or interim suspension is a draconian power because the licensed person is denied the ability to practice their profession and to earn a livelihood, and subjected to the possibility of reputational harm, in the absence of any finding of misconduct. The power "ought to be used sparingly": *Scott v College of Massage Therapists of British Columbia*, 2016 BCCA 180 at para 41 [*Scott*].

Authority to grant a stay

[30] Section 53(2) of the *Real Estate Act* allows a realtor to apply to this Court for a stay of a temporary suspension:

53(2) The licensee may, by application served on the Industry Council, apply to the Court for an order staying the order of the chair pending the outcome of the proceedings.

[31] The parties agree that the stay application is guided by the tripartite test described in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334, 347-349 [*RJR*] since no other test is prescribed by the statute:

- a) Is there a serious question to be tried?
- b) Will the applicant suffer irreparable harm if the stay is not granted?
- c) Does the balance of convenience between the parties favour granting the stay?

[32] The onus is on Mr. Kalia, as the Applicant, to show on a balance of probabilities that the application of the test favours a stay: *Irwin v Alberta Veterinary Medical Association*, 2015 ABCA 176 at paras 4 and 27 [*Irwin*].

[33] As explained in *Irwin*, at para 22, in the professional regulatory context, the balance of convenience analysis engages the public interest and public confidence in the regulator:

Whether the balance of convenience favours one party or another in a stay application, in the professional regulatory context, necessitates a consideration of whether granting a stay would be in the public interest, as well as whether the stay would affect the public's confidence in a profession's regulatory body's ability to regulate its members.

[34] Public confidence in this context means that the regulator is demonstrably performing its statutory obligation to protect the public in a manner that also respects the administration of justice. The public interest is advanced by finding a fair balance between public safety and the real estate agent's personal interests, including their livelihood and professional reputation.

[35] The Court affords some deference to the professional regulator in assessing whether to stay an interim or temporary suspension: *Kumar v College of Physicians and Surgeons of Alberta*, 2019 ABQB 514 at para 27 [*Kumar*]; *Park v Institute of Chartered Accountants of Alberta*, 2002 ABQB 880 at para 65 [*Park*]. Deference is appropriate because the regulator is selected by the Legislature to apply specialized knowledge and institutional expertise, in good faith, when balancing the protection of the public and the personal interests of the licensee.

Hearsay evidence and disclosure on a stay application

[36] In deciding whether to grant a stay, an assessment is made of the evidence supporting the temporary suspension at the time the stay application is heard: *Kumar* at para 27. This approach recognizes that the presence or absence of a *prima facie* case against the licensee, the potential harm to the licensee, and the risk to the public can change over time, especially if an investigation is ongoing.

[37] Mr. Kalia asserts a "structural disadvantage" in seeking a stay because RECA is relying on hearsay evidence and supposedly has not made complete and timely disclosure of exculpatory information to him during the investigation. He submits that his ability to make "full answer and defence" to the allegations is compromised, which creates a disadvantage in seeking a stay. Accordingly, he suggests that the Court should either not rely on the hearsay evidence or give it little weight. He also asks the Court to ensure that "procedural and substantive guarantees" are imposed so that he may robustly "review, vet, and assess the allegations."

[38] Mr. Kalia's position misconstrues the nature of a temporary suspension and therefore a stay application under s 53 of the *Real Estate Act*.

[39] The legislative purpose of a temporary or interim suspension is to protect the public while the regulatory body undertakes conduct proceedings, including the investigation into the allegations against its licensee and any hearing of the merits. In deciding whether to impose an interim suspension, the regulatory body is not determining whether the complaints are "true" or choosing between two competing versions of events. Instead, the regulator is assessing whether a *prima facie* case of misconduct is established such that in the surrounding circumstances, and having regard for the personal impact on the licensee, action is necessary to protect the public on an interim basis until the conduct proceedings are concluded: *Scott* at paras 45-58.

[40] In satisfying itself that a *prima facie* case is established, the regulator examines whether the evidence, if believed, covers all of the essential elements of the alleged misconduct and justifies a finding against the licensee in the absence of an answer. The regulator generally does not weigh the credibility or merits of a disputed allegation, except to discount evidence that is inconsistent with objective or undisputed evidence or which is manifestly unreliable. At this stage of the conduct proceeding, the regulator only seeks to exclude complaints that are manifestly unfounded or exaggerated: *Scott* at paras 55-57, 63.

[41] Hearsay evidence on a stay application is consistent with the nature of the evidence on which the temporary suspension may be granted. A temporary suspension is "analogous to the

jurisdiction exercised by the Courts to grant interim interlocutory relief in civil proceedings”: J. Casey, *The Regulation of Professions in Canada*, vol 2 (Toronto: Thomson Reuters, 2020) at 14-3. Hearsay is generally admissible on interlocutory applications.

[42] This approach to the evidentiary requirements recognizes that the regulator will usually be dependent on hearsay at this stage of the conduct proceedings, including hearsay from the complainants, given that the allegations are still under investigation or awaiting a full hearing. Timely protection of the public may not allow for a fulsome inquiry into the allegations. Interlocutory relief may be granted therefore on an urgent basis, relying on incomplete information, so that the public is safeguarded.

[43] Furthermore, the laws of evidence applicable to judicial proceedings do not apply to RECA’s conduct hearings: *Real Estate Act* at s 42(h). An interlocutory remedy, such as a temporary suspension or a stay of that suspension, is not subject to a more rigorous evidentiary standard than that demanded at the final hearing.

[44] Mr. Kalia is also bothered by the absence of timely and complete document disclosure from RECA. To some extent, a duty of procedural fairness applies when contemplating and imposing a temporary suspension: *Taylor v Law Society (British Columbia)* (1980), 116 DLR (3d) 41 at 45-46; *Mohan v College of Physicians and Surgeons (Ontario)* (1991), 81 DLR (4th) 108 at 117-118; *Park* at para 46. However, the content of that procedural fairness is usually diminished since an interlocutory suspension is not a final disposition of the allegations and a full hearing at this stage of the proceedings is normally impractical given that a rigorous process would substantially delay the regulator’s efforts to protect the public.

[45] RECA’s statutory obligation to make disclosure to a licensee in a conduct proceeding is addressed in s 42(a) of the *Real Estate Act*, which contemplates that full disclosure is made in advance of the hearing into the merits, not during the course of the investigation.

[46] Procedural fairness during the process of considering an interim or temporary suspension usually requires the regulator to provide its licensee with details about the allegations and an opportunity to respond before interlocutory action is taken, depending in particular on the gravity of the risk to the public and the need for urgency. However, full disclosure might properly be withheld during the investigation as a review officer gathers and tests the reliability of evidence. For example, a review officer might seek to explore the credibility of the licensee by collecting the licensee’s version of events before confronting the licensee with contrary evidence.

[47] A stay application generally should not interfere with the integrity of the conduct proceedings by compelling disclosure that compromises the investigation. While the regulator, in responding, may have some obligation to disclose updated information that materially compromises its *prima facie* case or to identify changes in its rationale for maintaining a temporary suspension, the disclosure obligation at this stage of the proceedings does not extend to generous discovery permitting the licensee to make full answer and defence.

[48] RECA has made some document disclosure to Mr. Kalia. At this stage of the conduct proceedings, he is aware of the allegations to which he must respond. He has been informed of RECA’s *prima facie* case and the reasoning for suspending his license to protect the public. I conclude that adequate disclosure has been supplied at this stage of the proceedings.

Analysis

[49] I will address each stage of the tripartite test for a stay and then comment on Mr. Kalia's alternative request for a stay on conditions.

A. Serious issue

[50] The parties agree that a serious issue has been established. Mr. Kalia denies the allegations of misconduct. He disputes some of the facts and also contests the legal implications of the facts.

[51] As RECA's investigation has not been completed, the merits of the complaints have not been fully assessed and the regulator advances only preliminary conclusions about misconduct and the risk to the public. Complex factual and legal issues cannot be resolved at this stage of the conduct proceedings.

B. Irreparable harm

[52] Irreparable harm is that "which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": **RJR** at 341.

[53] Where the anticipated or actual harm is financial, "clear and compelling evidence is required because the nature of the harm allows it to be proven by concrete evidence": **Newbould v Canada (Attorney General)**, 2017 FCA 106 at para 29 [**Newbould**]. The evidence must be "at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted": **Glooscap Heritage Society v Canada (National Revenue)**, 2012 FCA 255 at para 31. However, "harm to social interests such as reputation or dignity ... can be satisfied by inference from the whole surrounding circumstances": **Newbould** at para 29.

[54] At this stage of the analysis, the Court considers the nature of the harm, rather than its magnitude: **RJR** at 341. The extent of the harm is considered when weighing the balance of convenience.

[55] Mr. Kalia deposes that the temporary suspension will cause him irreparable harm because the loss of income impairs his ability to pay his household expenses and to financially support his elderly parents who are partially dependent on him. He asserts that mortgage and car payments will not be made. He fears the "very real possibility" that the mortgage holders will foreclose on the homes where his immediate family and his parents reside, and that their vehicles will be repossessed. He contends that no other employment opportunities are realistically available to him given his age (55) and his employment having been limited to real estate for the past 20 years. He does not know how he will provide for his family if the suspension continues.

[56] Details about Mr. Kalia's financial circumstances are not provided. His income level and savings are not disclosed. Nothing is revealed about the assets, retained earnings and cash reserves of Nawaab Inc. He does not offer information about his ability to borrow, including through personal lines of credit or Nawaab Inc.

[57] No monthly budget of expenses is presented. Mr. Kalia acknowledges that his wife works and that his parents draw some retirement income, but he does not provide any particulars about the monthly shortfall in meeting their obligations. He does not estimate when he will run out of money or be unable to pay his mortgage and vehicle payments.

[58] The evidence lacks particularity. However, he has been suspended for more than six months. The investigation is not finished and any conduct hearing is months away. If he is reinstated, financial recovery of his losses is highly improbable given RECA's immunity from an action for damages arising from the good faith exercise of its regulatory powers: *Real Estate Act* at s 78.

[59] I accept that significant financial loss is the likely result of a continuing suspension, although the extent of the loss is unknown.

[60] RECA submits that Mr. Kalia should mitigate his losses by seeking other employment, even temporarily, outside of trading in real estate. However, nothing before me demonstrates that Mr. Kalia has the training and experience to pursue other employment and to obtain material income while awaiting the start of a conduct hearing.

[61] The temporary suspension is known within the real estate industry and suggests that Mr. Kalia is a risk to the public. The reasonable inference is that his professional reputation is suffering as a consequence of the suspension. In and of itself, the reputational damage constitutes irreparable harm.

[62] I conclude that Mr. Kalia has demonstrated irreparable harm through the adverse impact on his income and reputation, but the full magnitude of the financial injury has not been established.

C. Balance of convenience

[63] The third stage of the inquiry weighs the interests of the public against the personal interests of the licensee, Mr. Kalia.

[64] An interlocutory suspension is reviewed somewhat differently than a suspension imposed as a sanction after a final determination of a complaint against a licensee.

[65] When examining an interlocutory order imposed by the regulator, the Court considers whether a *prima facie* case of misconduct has been established and whether interlocutory relief is necessary to protect the public from a real risk of harm. The strengths and weaknesses of the regulator's case are not otherwise assessed. A robust inquiry into the merits is premature and impractical: the regulator's investigation is ongoing; full disclosure and a detailed Court examination invite delay and administrative inefficiency; a lengthy merits review on an interlocutory basis diverts the regulator's limited resources from completing the investigation; and interim disclosure might interfere with the integrity of the investigation process. The stay application is therefore not a "mini-trial" of the complaints.

[66] In contrast, where a full hearing has been conducted and the final disposition rendered, the strength of the regulator's findings and analysis may be explored on a stay application pending appeal: *Irwin* at para 24.

[67] In weighing the balance of convenience on an application for a stay of an interim or temporary suspension, the Court considers several factors, including:

- a) whether a *prima facie* case of misconduct is shown on the merits;
- b) the nature and gravity of the impugned conduct;
- c) the circumstances in which the impugned conduct occurred;

- d) whether interim relief remains necessary to protect the public from a real risk of harm;
- e) the likelihood of the impugned conduct being repeated;
- f) the licensee's disciplinary history, if any;
- g) new allegations of misconduct reported or arising during the suspension;
- h) the extent of the licensee's cooperation with the investigation, which may assist in demonstrating the licensee's respect for regulatory compliance and professional governance in the immediate future;
- i) the overall passage of time in the conduct proceedings, including the likely timeline until the conclusion of the proceedings;
- j) the extent of the irreparable harm to which the licensee will continue to be exposed; and
- k) whether means less restrictive than a suspension are available to adequately protect the public.

See: *Irwin* at para 24; *Huerto v College of Physicians and Surgeons of Saskatchewan*, 2004 SKQB 423 at para 22 [*Huerto*]; *Law Society of Upper Canada v Silver*, 2015 ONLSTA 15 at para 24; *Scott* at para 55; *Rohringer v Royal College of Dental Surgeons of Ontario*, 2017 ONSC 6656 at para 26 [*Rohringer*]; *Kumar* at para 24.

[68] Mr. Kalia submits that the balance of convenience favours the granting of a stay. In his view, the allegations are isolated to leases signed in 2017, a single commercial project, and three former clients. No pattern of ongoing misconduct is shown. If a stay is granted, he will be subject to the RECA Code of Conduct and under the supervision of his brokerage. The public is therefore not exposed to a risk of harm. Conversely, the irreparable harm to Mr. Kalia and his family is substantial and will continue through lengthy conduct proceedings.

[69] RECA counters that the allegations involve fraud, breach of fiduciary duty, dishonesty, and breach of trust, which pose significant ongoing and material risks to the public. Mr. Kalia's response to the complaints demonstrates persisting concerns about his honesty and a poor understanding of his fiduciary obligations to his clients. His prior disciplinary history contains similar concerns and the allegations about Mr. Kalia's conduct since the commencement of the suspension suggest that he is ungovernable.

[70] I conclude that the record demonstrates a *prima facie* case of misconduct largely grounded in fraud, deliberate or reckless disregard of fiduciary duties, dishonesty, and breach of trust. The impugned misconduct, if proven, arguably offends ss 41 and 42 of the *Rules*.

[71] The nature and gravity of the allegations are very serious. Persisting concerns are raised, especially when contextualized by other findings of misconduct. They are not stale or confined to a short timeframe.

[72] The risk to the public is that Mr. Kalia does not understand or respect his fiduciary obligations to his clients, and that he is dishonest. As a real estate agent, he has access to and responsibility for substantial funds provided by clients. He is responsible for providing advice that protects his clients' financial and commercial interests. Integrity is important.

[73] The impugned conduct is not limited to defects in the preparation of the lease agreements in 2017. He is accused of maintaining a deception, since at least 2018, that the deposits were unconditional when the *prima facie* case demonstrates they were not, as well as failing to appreciate conflict of interest, the duty of disclosure, and other fiduciary responsibilities.

[74] The dishonesty concern arises most acutely, but not exclusively, in the controversy about whether the deposits were subject to conditions protecting the Tenants. Mr. Kalia asserts that the deposits were received unconditionally in 2017 and therefore could be released to Manning in 2018. However, his position suffers from incongruities.

[75] Mr. Kalia's April 25, 2018 handwritten note confirmed that construction of the complex had not started and that the deposits would remain in trust until the retail bays were completed. The obligation to hold the deposits in trust until the completion of a defined event implicitly recognizes that the deposits were conditional on that event occurring.

[76] Mr. Kalia also provides no explanation, at least before me, for placing the funds in trust and holding them for more than a year if the payments were unconditional. If no conditions were attached, the funds presumably would have been delivered directly to Manning or, if passing through the brokerage, would have been forwarded to Manning in a timely fashion.

[77] Unconditional deposits in these circumstances would seem to have been commercially imprudent. Final leases containing all of the essential terms did not yet exist. The business complex was not yet built. Re-zoning was not approved. One of the Tenants still required municipal approval for a liquor license, as confirmed by the Addendum signed by Mr. Kalia. The contention that the Tenants were all prepared to forfeit their deposits with no recourse against Manning seems implausible. If true, concerns arise about whether Mr. Kalia was providing careful and prudent advice as their real estate agent.

[78] The apprehension about Mr. Kalia not appreciating his fiduciary responsibilities is illustrated by Nawaab Inc. taking deposit funds for his benefit. Mr. Kalia asserts that he had no control over the release of deposits held by Re/Max and therefore cannot be faulted for the transfer of the clients' funds from the brokerage to his personal company. However, based on the evidence before the Court, his assertion is problematic.

[79] First, Mr. Kalia facilitated the transfer by providing documents to the brokerage that advanced Manning's request to release the funds from trust. Mr. Kalia was an active participant in removing the Tenants' protection.

[80] Second, the assertion ignores that Mr. Khali acknowledges being a fiduciary. As such, he owed independent obligations of trust, honesty, candor and good faith to his clients. If the deposits were conditional and the conditions had not been satisfied, Mr. Kalia arguably owed a responsibility to his clients not to accept funds for his personal advantage that should have been safeguarded in trust. That responsibility was not discharged by any decision made by the brokerage to release the funds. Mr. Kalia's failure to appreciate his own fiduciary obligations reinforces RECA's concern that he still does not understand his duties to his clients and that he poses a continuing risk to the public.

[81] While the allegations about fraudulent and dishonest behaviour are disconcerting on their own, the circumstances are more troubling since Mr. Kalia was already the subject of other conduct proceedings in 2018. He should have been especially sensitive at the time to his ongoing fiduciary obligations.

[82] A persisting risk to the public is also demonstrated by Mr. Kalia's overall and continuing pattern of behaviour. In October 2018, the regulator found that he had engaged in conduct deserving of sanction in unrelated matters. That misconduct included findings that he misled or deceived a person, failed to fulfil fiduciary obligations to clients, failed to disclose conflicts of interest, and failed to make written disclosures. He received a three-month suspension, which speaks to the gravity of the impugned conduct.

[83] Since the temporary suspension was imposed in May of this year, Mr. Kalia has been accused of engaging in the activities of a real estate broker, while not licensed to do so, and during his temporary suspension as a real estate agent. RECA has made one finding adverse to him, resulting in substantial administrative penalty. The finding is a final disposition, although still subject to appeal. Nevertheless, it is strong evidence of ongoing misconduct.

[84] Mr. Kalia is also the subject of a complaint from a lawyer who alleges that Mr. Kalia engaged in broker activity without a license while suspended as a real estate agent. The details of that complaint are contested by Mr. Kalia and are still in the early stages of investigation. Only a few details are provided. For the purposes of this stay application, I need not decide whether a *prima facie* case has been shown, as that determination does not affect the outcome before me. I attach no weight to this complaint in considering the request for a stay.

[85] The nature and gravity of the current allegations, the surrounding circumstances, the serious disciplinary history, and Mr. Kalia's conduct since the temporary suspension was imposed are especially concerning and suggest a substantial risk that the impugned conduct will be repeated if his license is restored. The conduct poses a real risk of harm to clients.

[86] As one counterweight, Mr. Kalia criticizes the length of time taken by the conduct proceedings. The investigation has been in progress since at least April 2021, but he has not yet been interviewed.

[87] After imposing a temporary suspension, the regulator is obligated to investigate and prosecute the alleged misconduct expeditiously: *Rohringer* at para 26. I agree that the draconian nature of an interim suspension demands that the regulator marshal the necessary resources to undertake the investigation swiftly.

[88] The Review Officer's evidence is that the complaints have required substantial effort to investigate. By July 12, 2021, she had collected approximately 800 documents, expending roughly 70 hours of investigative time. Follow-up interviews were required with some witnesses whose availability was restricted during the COVID-19 pandemic. Three investigation reports must be drafted for the Registrar. She maintains that the investigation is proceeding with "all due haste," recognizing the urgency created by the temporary suspension.

[89] When the stay application was heard before me, Mr. Kalia had not yet been interviewed and the Review Officer was suggesting that she might not be available throughout late November and all of December.

[90] The length of the investigative delay causes me some concern. Mr. Kalia has been suspended for more than six months, without a final determination by the Review Officer. Reports must still be prepared and submitted to the Registrar. If a decision is made that Mr. Kalia's conduct should be referred to a hearing, a Hearing Panel must be convened. Mr. Kalia has not materially contributed to the delay, except possibly for a recent dispute about his availability for an interview.

[91] Unreasonable delay in conduct proceedings before a professional regulator can constitute an abuse of process and invite various remedies, including a stay of proceedings: *Wachtler v College of Physicians and Surgeons of Alberta*, 2009 ABCA 130 [*Wachtler*]; *Bahadar (Re)*, 2018 ABRECA 16; *Law Society of Alberta v Odishaw*, 2011 ABLS 28 at paras 70-73; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44.

[92] Regardless of whether an abuse of process is shown, the passage of time is a relevant consideration in assessing the balance of convenience since the extent of the irreparable harm can be magnified by the delay.

[93] No application seeking a finding of abuse of process is before me. However, the jurisprudence applying the abuse of process doctrine offers some guidance about the extent of a permissible delay.

[94] In *Wachtler*, at para 28, the Alberta Court of Appeal stated that the investigation of a complaint against a physician by the Alberta College of Physicians and Surgeons should normally take no more than 12 months. While the Court of Appeal did not indicate that such a benchmark would apply to other professional regulators, the commentary offers some general assistance. Notably, *Wachtler* did not involve a licensee who was subject to an interim suspension – a circumstance that demands greater urgency.

[95] Some deference to the regulator is appropriate in determining the amount of time necessary for an investigation. In the current matter, the consequences of the pandemic might also be contributing to the delay.

[96] RECA submits that the investigation might be completed and any hearing started by February or March 2022. In the circumstances, recognizing the complexity and gravity of the complaints and the effects of the pandemic, that timeframe is reasonable.

[97] If RECA does not advance the conduct proceedings to a hearing within that timeframe, Mr. Kalia's ability to re-apply for a stay can be preserved, independent from any application for relief based on abuse of process that he might direct to a Hearing Panel. RECA's responsibility is to ensure that adequate resources are directed to the investigation to ensure completion within a reasonable period of time. I make no comment on whether the overall delay to date suggests any abuse of process.

[98] I have considered the irreparable harm being suffered by Mr. Kalia. While some continuing reputational and financial harm is likely between now and any hearing, the magnitude of the financial loss is unknown. The other consequential effects on his mortgage, car loans and credit rating are not adequately demonstrated, as they lack particularity.

[99] I conclude that the balance of convenience favours protection of the public, which outweighs the concerns about irreparable harm and delay. The consequences of the continuing suspension on Mr. Kalia are not disproportionate to the real risk from which RECA seeks to shield the public.

D. Conditions

[100] Mr. Kalia submits that if a stay is not acceptable to the Court, consideration should be given to imposing a stay with conditions that would allow him to work while protecting the public interest. He raises the possibility of appointing another realtor, his brokerage or RECA to

supervise and control any new deposits from clients, a prohibition on referral fee arrangements, and any other condition that would allow him to continue practicing as a commercial realtor.

[101] RECA counters that s 53(2) of the *Real Estate Act* does not authorize the Court to impose conditions of this nature, but that in any event, no conditions adequately address the protection of the public in these circumstances.

[102] On reviewing an interim or temporary suspension, the Court explores whether less intrusive means are available to protect the public until the conduct proceeding is completed. The regulatory body should impose the “least restrictive means” necessary to protect the public interest where the allegations are unproven and the legislation contemplates the possibility of imposing conditions or restrictions instead of suspension: **Kumar** at para 24; **Huerto** at para 21; **Morzaria v College of Physicians and Surgeons of Ontario**, 2017 ONSC 1940 at para 46 (Nordheimer J, commenting in dissent); **Rohringer** at paras 67-73; **Al-Naami v College of Physicians and Surgeons of Alberta**, 2021 ABQB 549 at paras 135-136 and 202 [**Al-Naami**].

[103] Subsection 53(2), however, does not expressly address whether conditions may be imposed by the Court. In contrast, section 53(1)(b) specifically empowers the chair of an Industry Council to impose conditions or restrictions on a licensee.

[104] In **Kumar**, which involved similar statutory language concerning physicians, my colleague Eidsvik J, at para 35, was prepared to incorporate chaperone conditions previously adopted by the regulator into the Court Order granting the stay. She declined to impose the further conditions requested by the College. Her authority for imposing the regulator’s conditions was not discussed. The statutory provision contained no express authority to add conditions to a stay.

[105] In **Huerto**, the review of the temporary suspension was conducted by the Court through a right of appeal that expressly allowed the Court to “vary” or “substitute” the suspension decision: see para 13.

[106] In **Al-Naami**, Renke J declined to order that the licensee be permitted to return to practice on conditions. My colleague explained at para 208:

Determination of the appropriate practice conditions — or even of whether ... there are any reasonably available practice conditions — goes beyond unaided judicial expertise.

[107] In lieu of a stay with conditions, Renke J ordered the College of Physicians and Surgeons to “reconsider whether, on the information currently available to the College, Dr. Al-Naami could be permitted to return to practice on conditions that would appropriately protect young patients” (para 212).

[108] I am not satisfied that s 53(2) authorizes the Court to impose conditions of the type proposed by Mr. Kalia. In effect, he is asking me to reinstate his license, while imposing restrictions or conditions on his ability to carry on business, including supervisory obligations and controls aimed at RECA and a brokerage entity that is not before the Court.

[109] Section 53(1)(b) expressly grants to the chair of an Industry Council the ability to impose conditions and restrictions. The chair is presumed to have specialized knowledge and institutional expertise from which to draw. In contrast, no such power is expressly given to the Court, which lacks the same insights about the real estate industry, including the operation of

brokerages. If the Legislature had intended to convey that authority to the Court, s 53(2) could have been written accordingly.

[110] An alternative approach, respectful of the regulator's expertise and governing authority, might be to stay a temporary suspension, but grant permission to the regulator to then impose conditions or restrictions through s 53(1)(b), utilizing its discretion in good faith.

[111] In this case, however, a definitive ruling on my authority to grant conditions or restrictions is unnecessary as I am not persuaded that any measures short of a temporary suspension will adequately protect the public. Mr. Kalia provides little explanation about the proposed supervision and controls that would safeguard his clients. The outstanding complaints involve situations in which he was already required to direct clients' funds to an independent brokerage in trust. He was already subject to reporting requirements. The allegations include numerous failures to draft contractual terms protecting his clients and failures to reveal conflicts of interests. The vague monitoring plan does not explain how these concerns will be addressed, especially in an industry where real estate agents tend to work independently and remotely.

[112] Concerns about dishonesty, breach of fiduciary duty, and a reckless disregard for his clients' interests are not addressed through the proposed conditions and restrictions. Challenges with his governability also undermine the efficacy of the proposal.

[113] Mr. Kalia suggests that another realtor could be appointed to supervise his work, but no candidate is identified.

[114] I conclude that the proposed conditions and restrictions suffer from imprecision and fail to address the breadth of the regulator's concerns. They do not sufficiently protect the public.

Conclusion

[115] The application for a stay is dismissed. Mr. Kalia is granted permission to re-apply for a stay if the conduct proceedings involving the Tenants' complaints have not advanced to the start of hearings on the merits by March 31, 2022.

[116] If the parties cannot resolve the costs of this application, they may provide written submissions to me within 45 days.

Heard on the 12th day of November, 2021.

Additional Written Submissions received the 16th and 19th days of November, 2021.

Dated at the City of Edmonton, Alberta this 30th day of November, 2021.



K.S. Feth
J.C.Q.B.A.

Appearances:

Avnish Nanda
Nanda & Company
for the Applicant

Andrew Bone
Real Estate Council of Alberta
for the Respondent