

**THE REAL ESTATE COUNCIL OF ALBERTA**

**IN THE MATTER OF** s. 39(1)(b) and s. 41 of the *Real Estate Act*, R.S.A. 2000, c. R-5

**AND IN THE MATTER OF** a Hearing concerning the conduct of  
**Lesley Fleming**, Agent registered at all material times hereto with Tempo Real  
Estate Ltd. o/a Royal Lepage Benchmark, Brokerage

**Hearing Panel members:** Pat Rudiger, Chair  
Graham Downey  
Al Dredge

**Appearing:** Mr. Todd Lee, on behalf of the Executive Director  
D.L. , on behalf of Lesley Fleming  
Ms. Lesley Fleming, respondent  
J.L. , broker

**Hearing Date:** October 6, 2005

**DECISION OF A HEARING PANEL OF THE REAL ESTATE COUNCIL OF ALBERTA**

**I) INTRODUCTION**

The Hearing Panel held a hearing into the conduct of Lesley Fleming, Agent registered at all material times hereto with Tempo Real Estate Ltd. o/a Royal Lepage Benchmark, Brokerage. The Hearing Panel was composed of Pat Rudiger (Chair), Graham Downey and Al Dredge.

The Hearing took place on October 6, 2005. In attendance at the hearing were Todd Lee, legal counsel on behalf of the Executive Director of the Real Estate Council of Alberta, D.L. , legal counsel on behalf of Lesley Fleming, Ms. Fleming and J.L. , Ms. Fleming's broker.

**II) ALLEGATIONS**

Lesley Fleming was called before the Hearing Panel to answer to the following allegations set out in the Amended Notice of Hearing:

1. Lesley Fleming ("Fleming") was at all relevant times, and continues to be, licensed as an agent with Tempo Real Estate Ltd. o/a Royal Lepage Benchmark ("Benchmark"). On or about March 17, 2003, Fleming signed a listing agreement with the W.'s to sell an acreage in the Calgary area. The list price was \$429,900 (the "Listing Agreement"). The Listing Agreement's term was 90 days. The Listing Agreement expired. The W.'s signed a further listing agreement with Fleming as Benchmark's representative on or about July 2, 2003 (the "Second Listing Agreement"). Fleming did not sign the Second Listing Agreement, nor did she arrange to have anyone else at Benchmark do so. The foregoing is conduct deserving of sanction, particulars of which include, but are not necessarily limited to, the following:

- a) By failing to obtain a signature from any representative of Benchmark on the Second Listing Agreement, Fleming participated in the creation of a contract or document that she knew or ought to have known was not legally binding, confusion or did not reflect any agreements already in place, contrary to s. 6(c) of the Code of Conduct,

all of which happened in Calgary, Alberta.

2. Further to the allegations in paragraph 1, on or about October 4, 2003, while acting as an agent for all parties, Fleming received separate instructions from B.S. and L.S. (the "S.'s") and the K.G. and C.G. (the "G.'s") to prepare offers to purchase the property, the particulars of which are summarized as follows:

	First S. Offer	G. Offer	Second S. Offer
<b>Purchase Price</b>	\$410,000.00	\$420,000.00	\$415,000.00
<b>Initial Deposit</b>	\$5,000.00	\$2,000.00	\$5,000.00
<b>Additional Deposit</b>	\$15,000.00	\$18,000.00	\$10,000.00
<b>New Financing</b>	\$340,000.00	\$315,000.00	\$350,000.00
<b>Cash to Close</b>	\$50,000.00	\$85,000.00	\$50,000.00
<b>Possession</b>	January 15, 2004	December 4, 2003	January 15, 2004
<b>Conditions</b>	New financing approved by October 16, 2003	New financing approved by October 18, 2003; Sale of Buyer's Home by November 15, 2003; 8 hour clause	No conditions

On or about October 5, 2003, both the First S. Offer and the G. Offer were presented by Fleming to the W.'s. The W.'s accepted the G. offer. On or about October 8, 2003, the S.'s instructed Fleming to prepare the Second S. Offer. It was presented by Fleming to the W.'s. The G.'s were informed of the Second S. Offer, and they waived all conditions further to the 8 hour clause. Further to all of the foregoing, the G.'s purchased the W.'s property. There were drafting errors in the G. Offer, and in particular:

- 1) Clause 8.1(d) of the Offer to Purchase confirmed that the sale of the Buyer's home was a condition of the contract, but the blank for "Condition Day" was left blank; and
- 2) Section 4 of the Sale of Buyer's Home Schedule was amended to read "that this condition have [sic] been satisfied or waived according to the Purchase Contract;" clause 6 was left

to read that, upon receipt of notice of a competing offer, the Buyer had 8 hours within which to waive "all of the Buyer's Conditions contained in the Purchase Contract;" the result of which was an inconsistency between clause 4 and clause 6 that could have forced the G.'s to waive both the buyer's sale and financing condition notwithstanding that the G.'s had not received approval for financing.

The foregoing is conduct deserving of sanction, the particulars of which include, but are not necessarily limited to, the following:

- a) By making errors in the G. Offer, Fleming participated in the creation of a contract or document that she knew or ought to have known was not legally binding, confusing or did not reflect any agreements already in place, contrary to s. 6(c) of the Code of Conduct;
- b) Or in the alternative, Fleming failed to render a competent service, contrary to s. 6 of the Code of Conduct,

all of which happened in Calgary, Alberta.

3. Further to the allegations in paragraphs one and two above, Fleming was acting as an agent for the W.'s, an agent for the S.'s, and an agent for the G.'s at all relevant times, further to which Fleming was in an inherent conflict of interest by simultaneously representing all three parties. Notwithstanding the foregoing, prior to entering into an agency relationship with the W.'s, S.'s and G.'s, Fleming failed to explain to any one or more of the W.'s, S.'s or G.'s:

- 1) That she was in an inherent conflict of interest;
- 2) The potential problems that such a conflict of interest could create; and
- 3) That the bests [sic] interests of any one or more of the W.'s, S.'s or G.'s could have been better served by having another industry member or members individually represent the W.'s, S.'s or G.'s.

Furthermore, Fleming failed to obtain informed consent from any one or more of the W.'s, S.'s and G.'s to act as agent for all of the parties, the inherent conflict of interest notwithstanding. The foregoing conduct deserving of sanction, the particulars of which include, but are not necessarily limited to, that Fleming

- a) Failed to use her best efforts to ensure that her role in the transaction was clearly understood by the parties to the transaction, contrary to s. 3 of the Code of Conduct; and
- b) Failed to disclose all relevant information to any one or more of the W.'s, S.'s and G.'s, contrary to s. 2(e) of the Code of Conduct.

all of which happened in Calgary; Alberta

4. Further to the allegations in paragraphs one, two and three above, in or about October, 2003, Fleming disclosed to the S.'s that the G. Offer had an 8 hour clause, and that it was for a price higher than that offered by the S.'s. The foregoing is conduct deserving of sanction, the particulars of which include, but are not necessarily limited to, that Fleming disclosed specific terms and conditions, regarding the G. Offer to the S.'s, and did so without informing the G.'s that this

information would be provided to other potential buyers, and without the G.'s permission to do so, contrary to s. 2(d) of the Code of Conduct, all of which happened in Calgary, Alberta.

5. Furthermore, or in the alternative, to what is alleged in paragraph four above, the Dual Agency form signed by Fleming and the G.'s on or about October 4, 2003 contained the following clause: "The Dual Agent ... will not, without prior written authority, disclose ... to you or other buyers the terms and conditions of competing offers." The foregoing is conduct deserving of sanction, the particulars of which include, but are not necessarily limited to, that, by informing the S.'s of the terms of the G. Offer without the G.'s written permission to do so, Fleming failed to follow the G.'s lawful instructions as per the Dual Agency form, contrary to s. 2(b) of the Code of Conduct, all of which happened in Calgary, Alberta.

6. Further to the allegations in paragraphs one, two, three, four and five above, under the terms of the G. Offer, the G.'s were obliged to deliver the \$18,000 additional deposit money immediately upon waiving all conditions (October 8, 2003). The additional deposit was not provided to Fleming until October 17, 2003. Notwithstanding the foregoing, Fleming did not instruct either the G.'s or the W.'s to amend the G. Offer to Purchase to allow for delivery of the additional deposit later than October 8, 2003, and no such amendment was ever agreed to by either the G.'s or the W.'s. The foregoing is conduct deserving of sanction, the particulars of which include, but are not necessarily limited to, the following:

- a) By failing to secure an amendment to the G. Offer allowing the deposit to be delivered later than that provided for under the G. Offer, Fleming participated in the creation of a contract or document that she knew or ought to have known was not legally binding, confusing or did not reflect any agreements already in place, contrary to s. 6(c) of the Code of Conduct;
- b) Or in the alternative, Fleming failed to render competent service, contrary to s. 6 of the Code of Conduct,

All of which happened in Calgary, Alberta.

7. Furthermore, or in the alternative, to what is alleged in paragraph six above, Fleming never informed the W.'s that the additional deposit was delivered late. The foregoing is conduct deserving of sanction, the particulars of which include, but are not necessarily limited to, that Fleming failed to disclose all relevant information to the W.'s, contrary to s. 2(e) of the Code of Conduct, all of which happened in Calgary, Alberta.

### III) EVIDENCE

We received an Admission of Conduct Deserving of Sanction pursuant to section 46 of the *Real Estate Act* from Mr. Lee. In the document, signed by Ms. Fleming, she admitted to the allegations of fact and breaches of provisions of the *Real Estate Act*, Rules and Code of Conduct as contained in the Amended Notice of Hearing, and admitted that her conduct in this regard was conduct deserving of sanction.

### IV) SUBMISSIONS

Mr. Lee submitted that as a result of Ms. Fleming's conduct deserving of sanction, as admitted to in the s.46, the Executive Director is seeking a sanction of a \$5,000 fine and costs of between \$5,000 and \$6,000. As a precedent, Mr. Lee referred to the 1999 Baker consent agreement. As part of that agreement, Mr. Baker received a fine of \$2,200 and was ordered to pay \$750 costs. Mr. Lee cautioned, however, that while the Baker case involved an agent in a conflict of interest position, as in the Fleming matter, the nature of the breaches was not as serious as before the Hearing Panel today.

Mr. Lee explained that the conduct the Executive Director is most concerned about is detailed in allegations three to five, but that Ms. Fleming has also admitted to late delivery of a deposit, which could have resulted in the purchase falling through. Mr. Lee submitted that the mitigating factors in this matter were that Ms. Fleming was cooperative with RECA investigators and with Legal Services and that she has no disciplinary history with RECA. As an aggravating factor, Mr. Lee referred to the nature of the conduct itself as the Executive Director views these actions as being quite serious.

D.L. submitted that Ms. Fleming has no disciplinary record with RECA and a lot of dual agency experience. He also submitted that Ms. Fleming did not agree with all of the allegations in the original Notice of Hearing prepared by Mr. Lee and that in fact, RECA allegations contradicted some of the regulations of the Calgary Real Estate Board. But, Ms. Fleming admitted guilt once the Notice of Hearing was amended. D.L. submitted that as the problematic allegation should not have appeared in the original Notice of Hearing, Ms. Fleming should not be ordered to pay costs from Mr. Lee's legal work necessary to amend the Notice of Hearing. D.L. admitted that Ms. Fleming does need to be sanctioned for her actions, however he advised the Hearing Panel that this matter is not one of a 'rogue' agent – there was no fraud and there was no benefit received by Ms. Fleming as a result of this deal.

D.L. referred the Hearing Panel to the case of Alex Pinnick from August 2003. The Pinnick matter involved disclosure of terms of an offer and just as in Fleming, there was no fraud or malicious deceit. Mr. Pinnick was ordered to pay a fine of \$2,000 and costs \$1,000, and D.L. submitted that a sanction of this level is more appropriate than the sanction suggested by Mr. Lee. With regard to education, D.L. submitted that Ms. Fleming be ordered to complete new agency courses when they are implemented next fall. With regard to costs, D.L. wanted it noted that the adjournment was requested by the Executive Director and Ms. Fleming should not have to bear those costs. Additionally, D.L. submitted to the Hearing Panel that Ms. Fleming should not be ordered to pay for costs that resulted from the additional time spent by the Executive Director's legal counsel to amend the Notice of Hearing, and that Mr. Lee's estimate of costs between \$5,000 and \$6,000 was too high.

## **V) FINDINGS**

The Hearing Panel accepts the Admission of Conduct Deserving of Sanction and finds that Ms. Fleming's conduct is conduct deserving of sanction as set out in the Amended Notice of Hearing.

## **VI) ORDERS**

As a result of our finding of conduct deserving of sanction, we hereby order, pursuant to section 43 of the *Real Estate Act*, that:

1. Ms. Fleming pay a fine of \$3,500.

2. Ms. Fleming successfully complete the Alberta Real Estate Association's Agency Relationships course by April 15, 2006. If this course is not available in this timeframe, an extension may be granted or a course substituted at the sole discretion of the Executive Director. This course cannot be used for credits in the required professional development program for agents and brokers.

While we accept the oral submissions on sanction that were provided by Mr. Lee and D.L. and have been able to make two orders on sanction, we are not able to proceed with an order relating to costs as Mr. Lee did not provide a written Estimated Schedule of Costs as is done. We ask that Mr. Lee provide a written Estimate Schedule of Costs to us within seven days of receipt of this decision. The Estimated Schedule of Costs is to also be provided to D.L., who will then have seven days to respond in writing. Once we have received written submissions on costs from both parties, we will issue a written decision on costs.

## **VII) REASONS**

Though D.L. submitted that the fine ordered in the Pinnick matter was more akin to what should be ordered in the Fleming matter than what was submitted by Mr. Lee, we disagree. Not only did Ms. Fleming disclose to the buyer 1 that buyer 2's offer had an 8 hour clause, and that it was for a price higher than that offered by the buyer 1 therefore contravening section 2(d) of the *Code of Conduct*, Ms. Fleming also failed to notify the sellers that an additional deposit was received late and the contract was not amended to reflect this. As a result of Ms. Fleming's actions, the deal could have fallen through. Though Ms. Fleming is fortunate that the deposit issue did not result in a problem for the buyers or sellers, her actions require a fine more severe than that which was imposed on Mr. Pinnick.

We also want it noted that the sale in question was for a \$420,000 property. D.L. argued that Ms. Fleming had not benefited in any way from her mistakes. We beg to differ as Ms. Fleming received a commission on the sale. For that reason, we do find that Ms. Fleming should receive a greater fine than that which was given to Mr. Pinnick. However, as Ms. Fleming was cooperative throughout the hearing process and given her clean disciplinary history with RECA for 17 years, we are not ordering as large a fine as that submitted for by Mr. Lee.

This decision was made on October 17, 2005

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**Hearing Panel members:** Pat Rudiger, Chair  
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**Submissions:** Mr. Todd Lee, legal counsel on behalf of the Executive Director  
D.L. , legal counsel on behalf of Lesley Fleming

### **DECISION OF A HEARING PANEL OF THE REAL ESTATE COUNCIL OF ALBERTA ON COSTS**

Following our October 17, 2005 decision in this matter, we have received submissions on costs. Mr. Lee has submitted a breakdown of RECA's costs of this hearing, totaling \$6,302.52. He argues that Ms. Fleming ought to be ordered to pay all of these costs.

D.L. made a number of submissions, ultimately concluding that some RECA costs were unnecessarily incurred, and asking that costs be reduced to \$1,500. He submitted that Ms. Fleming cooperated throughout the investigation and hearing process, she fully admitted her responsibility for conduct deserving of sanction once the Notice of Hearing was amended, she sought a Hearing Panel order of education to become further aware and assure no further issues arise, and the complaint itself arose in a novel set of circumstances and was not a course of extended or deliberate misconduct or malfeasance.

During the hearing itself, Mr. Lee submitted that he would not ask us to order Ms. Fleming to pay the costs associated with the adjournment application on the part of the Executive Director and he submitted that those costs would be subtracted from the schedule of costs in this matter. We agree with this course of action and have made the assumption that the schedule of costs submitted to us for our consideration by Mr. Lee has had the costs associated with that adjournment removed.

At issue during the hearing were also costs associated with amending the Notice of Hearing. D.L. submitted that there was an apparent conflict between Calgary Real Estate Board rules for its members and the RECA *Code of Conduct*. As a result, Ms. Fleming objected to one of the allegations in the original Notice of Hearing and the Notice of Hearing was then amended to address and resolve Ms. Fleming's objections to it. This did not take place until after the involvement of the Executive Director's legal counsel and prior to the first scheduled Hearing date, therefore incurring additional costs.

Mr. Lee submitted that it is the Executive Director's policy to seek full cost recovery regardless of the above, but that it is ultimately at our discretion.

### **ORDERS**

Having considered the submissions of Mr. Lee and D.L. , we find it is not reasonable to reduce the costs payable by Ms. Fleming. Mr. Lee has itemized the costs incurred as a result of Ms. Fleming's disciplinary proceedings and we note that Ms. Fleming has not been ordered to pay adjournment costs. We agree that as the adjournment application was not on behalf of Ms. Fleming, those costs should not be borne by her and they will not be.

We also want to point out that while the Executive Director's policy is to seek full cost recovery, during the hearing process we were informed by Mr. Lee that his costs submitted of \$100 per hour are only a portion of the actual rate charged to RECA. Partly as a result of that, we feel that Ms. Fleming should be ordered to pay the costs submitted for by Mr. Lee because even then, RECA is not recovering its full costs.

In addition, we actually find that an additional \$50 costs should be ordered payable by Ms. Fleming as Mr. Lee submits that the Hearing Panel honorarium is \$450 and it is actually \$500.

Therefore, we hereby order Ms. Fleming to pay hearing costs of \$6,352.52.

This decision was made on November 3, 2005

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