

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 **Ed Serna**, mortgage agent, registered at all material times hereto with M. Richard & Associates Inc.

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

I) INTRODUCTION

The Hearing Panel held a hearing into the conduct of Ed Serna, mortgage agent, registered at all material times hereto with M. Richard & Associates Inc., located in Calgary, Alberta. The Hearing Panel was composed of Eric Stewart (Chair), D'arcy Donald and Darrell Cook.

The Hearing took place via teleconference on December 16, 2004. In attendance at the hearing were Ryana Mather, on behalf of the Executive Director of the Real Estate Council of Alberta, and Ed Serna, on his own behalf.

II) ALLEGATIONS

Ed Serna was called before the Hearing Panel to answer to the following allegations set out in the Notice of Hearing:

1. That during the period of March 2002 to June 2002, contrary to section 2(a) of the *Code of Conduct*, you breached your fiduciary duty to your client by failing to act in her best interests when you obtained a mortgage product that did not meet your client's needs and you failed to adequately address your client's concerns. When you conducted yourself in an unprofessional manner when dealing with your client. This is conduct deserving of sanction, particulars of which are as follows:

- (a) In March 2002, A.C. contacted you to assist her in obtaining a mortgage for the purpose of refinancing her home and to pay off her debt.
- (b) You were the mortgage agent with respect to obtaining a mortgage.
- (c) A.C. requested a mortgage in the amount of \$135,000, and a mortgage that permitted her to double-up on monthly mortgage payments (the "Double-Up Option").
- (d) You obtained for A.C. the MCAP Mortgage Corp. ("MCAP") mortgage in the amount of \$141,240. The mortgage did not provide the Double-Up Option.
- (e) You did not provide alternative mortgage products to your client; nor did you investigate other lending institutions that may have offered products suitable to your client's needs.

(f) Throughout the course of the mortgage transaction, A.C. made several inquiries to you and you failed to address her concerns. Instead you referred your client to MCAP representatives to provide a response.

2. That during the period of March 2002 to June 2002, contrary to section 2(a) of the *Code of Conduct*, you breached your fiduciary duty to your client by failing to act in her best interests when you conducted yourself in an unprofessional manner when dealing with your client. This is conduct deserving of sanction, particulars of which are as follows:

(a) In your communications with your client you made inappropriate comments and conducted yourself in an unprofessional manner. You sent a series of emails to your client that were caustic in tone and are characterized as demeaning and disrespectful.

(b) You had a personality conflict with A.C., which you failed to deal with in a professional manner.

3. That in the period of March to June 2002, contrary to section 2(b) of the *Code of Conduct*, you breached your fiduciary duty to your client by failing to act in accordance with her lawful instructions when you did not exclude specific debts from the mortgage proceeds, and to obtain a mortgage product offering a double-up payment option. This is conduct deserving of sanction, particulars of which are as follows:

(a) On March 11, 2002, A.C. completed a handwritten mortgage application where she requested the mortgage proceeds to be allocated to specific debts. She did not want the Canadian Tire and Amex debts to be paid from the mortgage proceeds.

(b) A.C. instructed you to exclude the above two debts from the mortgage application and contrary to her instructions you did not.

(c) A.C. instructed you to find a mortgage that offered the Double-Up Option. The MCAP mortgage product does not offer this option and you failed to inform your client of this fact.

4. That in the period of March to June 2002, contrary to section 6(a) of the *Code of Conduct*, you failed to render a competent service when you obtained a mortgage product that did not satisfy your client's instructions, when you improperly assessed the CMHC insurance premium, and when you failed to investigate other mortgage products. This is conduct deserving of sanction, particulars of which are as follows:

(a) In an email dated May 8, 2002 from A.C., she asked you to confirm the Double-Up Option and for further information regarding the option. You forwarded her inquiry to MCAP representatives rather than informing her that there was no option available with MCAP.

(b) You were incompetent with respect to the CMHC premiums and the types of options available. You inaccurately assessed the CMHC fees and failed to provide the lowest premium available to your client. You had no knowledge of the options available, specifically the top-up premium, which would have been in the best interest of your client.

(c) A.C. requested a total mortgage loan in the amount of \$135,000 and instead you obtained a mortgage in the amount of \$141,240. She obtained a larger mortgage than was necessary.

(d) You did not provide alternative mortgage products to your client and nor did you investigate other lending institutions that may have offered products suitable to her needs.

5. That in the period of March to June 2002, contrary to section 7(f) of the *Code of Conduct*, you discouraged your client from seeking legal advice from a local lawyer. This is conduct deserving of sanction, particulars of which are as follows:

(a) You informed your client that L.O. , a Calgary lawyer, was the lawyer to be used to handle the mortgage transaction. You did not properly advise your client that she was entitled to select a lawyer of her choice.

(b) A.C. would have preferred to use a local lawyer in Edmonton.

III) EVIDENCE

The Hearing Panel received an Admission of Conduct Deserving of Sanction pursuant to section 46 of the *Real Estate Act* from Ms. Mather and Mr. Serna. In the document, signed by Mr. Serna, he admitted to the allegations of fact and breaches of provisions of the *Real Estate Act*, Rules and Code of Conduct as contained in the Notice of Hearing and admitted that his conduct in this regard was conduct deserving of sanction.

IV) SUBMISSIONS

Ms. Mather and Mr. Serna requested that the Hearing Panel accept the Admission of Conduct Deserving of Sanction.

Ms. Mather provided the Hearing Panel with four precedent cases for their consideration, as well as an Estimated Schedule of Costs, with a total of \$5,466.88. Ms. Mather asked the Hearing Panel to consider a fine of \$3,500, costs of \$3,000, and successful completion of the "Professional Responsibilities" course offered by the Alberta Real Estate Association or successful completion of the Real Estate Institute of Canada's course 2280 "Legal Issues in Real Estate."

Ms. Mather submitted that the Executive Director was asking for costs of only \$3,000 because Mr. Serna signed an s. 46 Admission of Conduct Deserving of Sanction, co-operated throughout the hearing process and had not been fraudulent in his dealings. Ms. Mather explained that Mr. Serna failed to render a competent service and failed to fulfill his fiduciary duties, and admits his errors.

Mr. Serna submitted to the Hearing Panel a number of character reference letters and further explained that during the transaction in question, he was under a lot of stress. He outlined that as a mortgage agent, he has worked with more than 700 clients and this is the first complaint against him. Mr. Serna apologized for his conduct and expressed concern for his tarnished reputation. He also addressed the case precedents provided to the Hearing Panel by Ms. Mather by saying that they appear to each deal with fraud or illegal activity, and since his dealings were not fraudulent, he did not believe his sanction should be as severe.

V) FINDINGS

The Hearing Panel accepts the Admission of Conduct Deserving of Sanction and finds that Mr. Serna's conduct is conduct deserving of sanction as set out in the 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. Mr. Serna pay a fine of \$1,500 within 60 days of receipt of this decision.
2. Mr. Serna pay costs totaling \$2,000 within 60 days of receipt of this decision.
3. Mr. Serna complete the "Professional Responsibilities" course offered by the Alberta Real Estate Association within six months of receipt of this decision. If this course is not available in this time frame, an extension may be granted at the sole discretion of the Executive Director.

The Hearing Panel orders a lower fine than what was requested by Ms. Mather because Mr. Serna's conduct did not involve fraud. They examined the precedent cases provided to them by Ms. Mather and found that those cases involved fraud, but that because Mr. Serna was not found to be fraudulent, the sanction should be lower than what was submitted for consideration by Ms. Mather. However, the Hearing Panel still felt a fine was necessary because of the admission of conduct deserving of sanction. Mr. Serna needed some punishment for his actions.

With regard to the costs ordered, the Hearing Panel states that because Mr. Serna co-operated throughout the hearing, the hours spent preparing for the hearing were excessive and therefore the costs asked for by Ms. Mather were excessive. As such, the Hearing Panel orders that Mr. Serna pay lower costs than those which were requested by Ms. Mather.

The Hearing Panel also orders successful completion of the "Professional Responsibilities" course offered by AREA. Because a lack of professionalism played a great part in Mr. Serna's actions and the Hearing Panel believes this course will reinforce his accountability in such situations.

Dated this 30 day of December, 2004.

"Eric Stewart"

Eric Stewart, Chair

"D'arcy Donald"

D'arcy Donald

"Darrell Cook"

Darrell Cook