

IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
S.B.C. 2004, c. 42 as amended

AND

IN THE MATTER OF

MARK JOSEPH EPSTEIN
(098252)

CONSENT ORDER

RESPONDENT: Mark Joseph Epstein, Associate Broker,
Kerrisdale Realty Limited dba Royal
LePage Westside

DATE OF REVIEW MEETING: May 17, 2017

DATE OF CONSENT ORDER: May 17, 2017

CONSENT ORDER REVIEW COMMITTEE: R. Holmes, Q.C., Chair
J. Daly
E. Mignosa
T. Styffe
M. Leslie

ALSO PRESENT: E. Seeley, Acting Executive Officer
G. Thiele, Director, Legal Services
Jessica Gossen, Legal Counsel for the
Real Estate Council

PROCEEDINGS:

On May 17, 2017 the Consent Order Review Committee ("Committee") resolved to accept the Agreed Statement of Facts, Proposed Acceptance of Findings and Waiver ("ASF") submitted by Mark Joseph Epstein.

WHEREAS the ASF, a copy of which is attached hereto, has been executed by Mark Joseph Epstein and on behalf of the Council;

NOW THEREFORE, the Committee having made the findings proposed in the attached ASF, and in particular having found that Mark Joseph Epstein committed professional misconduct within the meaning of section 35(1)(a) of the *Real Estate Services Act*, orders that he:

1. be reprimanded;

2. at his own expense, shall register for and successfully complete the Strata Management Remedial Education Course, as provided by Sauder School of Business at the University of British Columbia in the time period as directed by the Council; and
3. shall pay enforcement expenses of this Consent Order to the Council in the amount \$1,250.00 within sixty (60) days from the date of this Order.

If Mark Joseph Epstein fails to comply with any term of this Order, the Council may suspend or cancel his licence without further notice to him, pursuant to sections 43(3) and 43(4) of the *Real Estate Services Act*.

Dated this 17th day of May, 2017 at the City of Vancouver, British Columbia.

ON BEHALF OF THE CONSENT ORDER REVIEW COMMITTEE

"R. Holmes"

R. Holmes, Q.C., Chair
Consent Order Review Committee

Atch.

**IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
S.B.C. 2004, c. 42**

**IN THE MATTER OF
MARK JOSEPH EPSTEIN
(098252)**

**AGREED STATEMENT OF FACTS,
PROPOSED ACCEPTANCE OF FINDINGS AND WAIVER**

The following agreement has been reached between Mark Joseph Epstein ("Mr. Epstein") and the Real Estate Council of British Columbia ("Council"):

- A. Mark Joseph Epstein hereby consents to an Order to be made pursuant to sections 41 and 43 of the *Real Estate Services Act* ("RESA") that he be reprimanded; and that he, at his own expense, register for and successfully complete the Strata Management Services Remedial Education Course as provided by the Real Estate Division, Sauder School of Business at the University of British Columbia within the time period as directed by the Council. Further, he agrees to pay enforcement expenses of this Consent Order to the Council in the amount of \$1,250.00 within sixty (60) days from the date of the Order herein. Mr. Epstein further consents to an Order that if he fails to comply with any of the terms of the Order set out above, a Discipline Hearing Committee may suspend or cancel his licence without further notice to him pursuant to section 43(3) and 43(4) of the *Real Estate Services Act*.
- B. As the basis for this Order, Mr. Epstein acknowledges that the facts set forth herein are correct:
1. Mr. Epstein was at all relevant times licensed as a representative with Kerrisdale Realty Limited dba Prudential United Realty ("Prudential").
 2. Mr. Epstein's licensing history is as follows:

| <u>Start Date</u> | <u>End Date</u> | <u>Brokerage</u> | <u>Licence Level</u> | <u>Licence Category</u> |
|-------------------|-----------------|---|----------------------|-------------------------|
| 2005/12/13 | Present | Kerrisdale Realty Limited dba Royal LePage Westside (X018551) | Associate Broker | Trading, Rental, Strata |
| <u>Start Date</u> | <u>End Date</u> | <u>Brokerage</u> | <u>Licence Level</u> | <u>Licence Category</u> |

Agreed Statement of Facts, Proposed Acceptance of Findings and Waiver

| | | | | |
|------------|------------|--|------------------|--------------------|
| 1994/05/04 | 2005/12/13 | Kerrisdale Realty Limited dba Royal LePage Westside (X018551) | Associate Broker | Trading, Rental |
| 1992/05/04 | 1994/05/03 | Kerrisdale Realty Limited dba Royal LePage Westside (X018551) | Representative | Trading, Rental |

3. Prudential was party to an agency agreement (the "Agency Agreement") with a strata corporation on Comox Street in Vancouver, BC (the "Strata"). The Agency Agreement was dated for reference October 1, 2007.
4. At all material times, Mr. Epstein was the licensee at Prudential who had been appointed the Strata's property manager.
5. In December, 2012, the Strata held a Special General Meeting (the "SGM") at which the owners present voted to terminate the Agency Agreement (the "Resolution"). At that time, Prudential had provided strata management services to the Strata for approximately 18 years.
6. In early January, 2013, Mr. Epstein, informed MB, the managing broker of Prudential, that he believed the SGM had been invalidly held because the Strata had not complied with the notice requirements of the *Strata Property Act*, S.B.C. 1998, c. 43 ("*Strata Property Act*").
7. Prudential sought legal advice about the validity of the SGM and the Resolution and regarding communications it had received in early January 2013 individuals associated with the Strata.
8. In a without-prejudice letter to the Strata dated January 16, 2013, counsel for Prudential ("Counsel") wrote that: he acted for Prudential; the SGM had been improperly held; and Prudential had been "seriously libeled" by communications from individuals associated with the Strata.
9. On January 24, 2013, Counsel wrote a further without-prejudice letter to the Strata reiterating Prudential's position that the Resolution was invalid and that Prudential had been "maliciously maligned" by individuals associated with the Strata.
10. By invoice dated February 5, 2013 ("Invoice"), Counsel issued his account of \$1,586.82 addressed to Prudential. The Invoice covered Counsel's fee both for legal advice provided concerning the validity of the SGM and for his correspondence sent to the Strata.
11. On February 8, 2013, Prudential paid the Invoice out of funds it held in trust for the Strata.

12. Mr. Epstein initialed the Invoice to approve its payment from the Strata's funds.
13. Prudential did not have authorization from the Strata to pay the Invoice from the Strata's funds.
14. Mr. Epstein says that, in or about early March 2013, he arranged to meet with a representative of the Successor Brokerage, at Prudential's office, to receive and take possession of the financial statements and other records of the Strata and to ensure their completeness.
15. On March 5, 2013, Mr. Epstein says a licensee ("Licensee") at the successor brokerage to Prudential ("Successor Brokerage") attended at Prudential's office, at a time when Mr. Epstein was not present, and picked up certain records related to the Strata. When he took possession of the records, the Licensee signed a written acknowledgment that the documents taken included the financial statements for the Strata.
16. By letter to Mr. Epstein dated May 3, 2013, the Licensee protested the payment of the Invoice from Strata trust funds without the Strata's authorization and demanded reimbursement from Prudential. He also asserted that he had only received two months of financial statements from Prudential. With the Licensee's letter, he enclosed an article from a Report from Council dated December 2012, entitled "Obligations When Strata Management Brokerage Receives Notice to Terminate Service Agreement". The article includes the following:

Delivery of records

If requested, the Council Rules require the brokerage to provide the following records to a former strata corporation client, or if the strata corporation engages another brokerage, to that brokerage, by the later of the date that is 4 weeks following the date of termination or the date that is 2 weeks following the date of the request:

- banking records relating to account transactions of all trust accounts held on behalf of the strata corporation, including bank statements and cancelled cheques;
- other source documents confirming deposits or withdrawals;
- a record showing amounts received and disbursed, the reason for the receipt or disbursement, and any unexpended balance;
- monthly reconciliations of banking statements of all trust accounts held on behalf of the strata corporation; and
- unless they have already been provided, invoices for expenditures incurred on behalf of the strata.

Additionally, the Strata Property Act (SPA) also contains provisions regarding the return of a strata corporation's records when a strata management contract ends (SPA section 37 and Regulation 4.3)

17. By letter dated May 9, 2013, Mr. Epstein responded to the Licensee that Prudential had sought legal advice because the Strata did not give legal notice to terminate the Agency Agreement. Mr. Epstein declined on behalf of Prudential to forward payment for the Invoice. He relied on section 3(g) of the Agency Agreement as entitling Prudential to pay the Invoice without authorization from the Strata:

3. THE STRATA CORPORATION AGREES from and after the Effective Date:

* * * *

(g) To save the Agent harmless from and against all claims, damages, costs and liabilities incurred in connection with the services provided to the Strata Corporation and, without limiting the foregoing, to indemnify the Agent from all claims) damages, costs and liabilities whatsoever incurred by the Agent arising out of any acts or omissions of the Agent and to protect the Agent against all such claims, damages, costs and liabilities in the same manner and to the same extent as the Strata Corporation

Mr. Epstein further wrote that because Prudential had submitted financial statements to the Strata on a monthly basis and they had been approved by the Strata's council, financial statements would be available from the Strata's treasurer.

18. Mr. Epstein's May 9, 2013 letter did not enclose additional financial statements. The letter indicated that any further questions should be addressed to Prudential's managing broker, MB.
19. Mr. Epstein says that he believed the documents picked up by the Licensee from Prudential's office included all of the documents that Prudential was obligated to provide to the Successor Brokerage upon termination of the Agency Agreement.
20. The Agency Agreement includes the following additional provisions:

4. THE AGENT AGREES from and after the Effective Date:

(f) To keep full and detailed records of the transactions of the Strata Corporation and to retain the records required to be maintained by the Strata Property Act and its Regulations for such periods as are require[d];

* * * *

(j) To keep full and accurate records of the transactions of the Strata Corporation and to retain the records required to be maintained under section 35 of the Strata Property Act (except any documents under section 35 of the Strata Property Act not provided to the Agent by the Strata Corporation) for the time periods required under the Strata

Property Act, its regulations and RESA;

(k) To ... return all records upon termination of this Agreement in accordance with the Strata Property Act and RESA

21. The *Strata Property Act*, section 35 provides in part as follows:

Strata Corporation Records

35 (1) The strata corporation must prepare all of the following records:

* * * *

(d) books of account showing money received and spent and the reason for the receipt or expenditure;

* * * *

(2) The strata corporation must retain copies of all of the following:

(a) the records referred to in subsection (1);

* * * *

(i) the budget and financial statement for the current year and for previous years;

(3) Records referred to in this section must be retained by the strata corporation for the periods set out in the regulations.

22. Section 37 of the *Strata Property Act* provides as follows:

Strata manager to return records

37 (1) If a strata management contract ends, the person providing the strata management services must, within 4 weeks, give the strata corporation any records referred to in section 35 that are in the person's possession or control.

(2) A person who fails to comply with subsection (1) must pay to the strata corporation an amount calculated according to the regulations.

23. From May 16, 2013 through June 24, 2013, further correspondence was exchanged between MB and the Licensee regarding reimbursement for the Invoice and delivery of the additional financial statements and other Strata records. Mr. Epstein was not a party to that correspondence.
24. Prudential has subsequently reimbursed the Strata for the Invoice and has paid \$1,000.00 to the Strata in accordance with section 37(2) of the *Strata Property Act* and section 4.3 of the Strata Property Regulation, B.C. Reg. 43/2000.

25. Although having worked as a licensee continuously for 25 years, Mr. Epstein has no prior discipline history with the Council.
- C. Proposed Acceptance of Findings and Waiver
1. Based on the Agreed Statement of Facts as outlined herein, and without making any admissions of liability, Mark Joseph Epstein is prepared to accept the following findings if made against him by the Council's Consent Order Review Committee:
 - (a) Mr. Epstein committed professional misconduct within the meaning of section 35(1)(a) of the *Real Estate Services Act* in that:
 - (i) contrary to section 3-4 of the Council Rules, he failed to act with reasonable care and skill by initialing the Invoice, indicating his approval for Prudential to pay it, when he knew that Prudential, based on his approval, would likely pay the Invoice from the Strata's trust account when the Strata had not consented to such payment, and where the Invoice related to legal advice sought by Prudential in relation to a matter which, in whole or in part, concerned Prudential's interests rather than the Strata's interests.
 - (ii) contrary to section 3-4 of the Council Rules, he failed to act with reasonable care and skill by failing, after receiving the Licencee's May 3, 2013 letter, to conduct such searches or enquiries as may have been needed to determine whether Prudential had provided to the Successor Brokerage all of the records listed in section 35 of the *Strata Property Act*, and in failing to cause Prudential to provide to the Successor Brokerage any further records not previously provided to it.
 2. Mr. Epstein hereby waives his right to appeal pursuant to section 54 of the Real Estate Services Act.
 3. Mr. Epstein acknowledges and is aware that the Council will publish the Consent Order and penalty herein in its Report from Council newsletter, on the Council's website, and on CanLii, a website for legal research.
 4. Mr. Epstein acknowledges and is aware that the Superintendent of Real Estate has the right, pursuant to section 54 of the *Real Estate Services Act*, to appeal any decision of the Council) including this Agreed Statement of Facts, Proposed Acceptance of Findings, and Waiver and Consent Order.
 5. The Agreed Statement of Facts and Proposed Acceptance of Findings contained herein are made for the sole purpose of resolving a complaint being considered by the Council and for that purpose only.

Agreed Statement of Facts, Proposed Acceptance of Findings and Waiver

6. The proposed acceptance of findings contained herein are made for the sole purpose of resolving a complaint being considered by the Council and for that purpose only. Such proposed acceptance of findings cannot be used in any other proceeding of any kind.

"P. Gilligan-Hackett"

"M. Epstein"

Patrick Gilligan-Hackett, Legal Counsel
Real Estate Council of British Columbia

Mark Joseph Epstein

As to Part H only (Agreed Statement
of Facts)

As to Parts A, B and E, (Proposed Penalty), B
(Agreed Statement of Facts) and I (Proposed
Acceptance of Findings and Waiver)

Dated this 15th day of February, 2017

Dated this 15th day of February, 2017

"J. Scouten"

Jeffrey P. Scouten, Legal Counsel for
Mark Joseph Epstein

As to Part B only (Agreed Statement of Facts)

Dated this 15th day of February, 2017