

September 26, 2001

IN THE MATTER OF: THE REAL ESTATE BROKERS ACT

- and -

IN THE MATTER OF: JOSE ANTONIO PEREIRA

**REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION**

Panel

Chair	Mr. D. G. Murray
Board Members:	Mr. R. G. McEwen Mr. K. S. Kristjanson

Appearances:

Ms K. G. R. Laycock) Counsel for the Commission
Mr. K. M. Saxberg) Counsel for the Appellant
Mr. D. Kreklewich)
Mr. R. Olschewski)

Background

The appellant, Mr. Pereira, was registered with the Commission as a real estate salesman from April 5, 1991 to June 22, 2001. Following an investigation into allegations of misconduct against Mr. Pereira he was suspended by commission order #2452 dated June 22, 2001. The order was based on allegations that Pereira and one Mr. Lopes, an associate of Pereira's, had prepared and/or used false "gift letters" to obtain or attempt to obtain mortgage financing in certain real estate transactions.

The suspension was returnable for review before a panel of the Commission on July 6, 2001. The issue to be determined was if it was in the public interest to continue the interim suspension pending a full hearing of the allegations. On July 6th, Mr. Pereira appeared in the company of counsel (Mr. Santos). After receiving representations from Pereira's counsel and Commission staff counsel the panel adjourned the hearing until July 11, 2001 for further submissions. At the same time a date was set for the hearing of the allegations against Pereira for August 20 through 22 inclusive. Order #2453 issued, extending the interim

On July 11th the hearing was reconvened at which time the panel was advised by counsel appearing on behalf of Re/Max Real Estate Inc., Pereira's employing broker, that his employment had been terminated on June 22, 2001. Commission staff had not been advised of the termination.

Under s.13(1) of The Real Estate Brokers Act the termination of a salesman results in an automatic suspension which remains in effect until the employing broker rehires the salesman or the transfer of the salesman's registration to another broker is approved by the registrar. As such the consideration of an interim suspension for cause was rendered moot. The hearing adjourned and order #2453 lapsed. The hearing dates for consideration of the allegations against Mr. Pereira remained fixed for August 20, 21 and 22, 2001.

On July 16, 2001 Pereira filed an application to transfer his registration to Centennial Realty Ltd. Centennial provided a letter to the registrar confirming its willingness to employ Mr. Pereira.

By letter of July 20, 2001 the registrar advised Pereira and Centennial Realty Ltd. that he would not approve the transfer application. As a result Mr. Pereira would remain suspended by operation of the Act pending the hearing commencing August 20, 2001.

On August 20, 2001 the scheduled hearing convened. Both Mr. Pereira and Mr. Lopes attended with their respective counsel. Mr. Raposo on behalf of Lopes advised the panel that his client would settle the allegations against him by way of a Settlement Agreement to be entered into between his client and Commission staff.

Mr. Pereira's counsel, Mr. Santos, advised the panel that certain matters had recently come to his attention that made it impossible for him to continue representing Mr. Pereira. He sought leave to withdraw and leave was granted. Mr. Olschewski, a lawyer in attendance at the hearing then advised the panel that he was considering representing Mr. Pereira but would require a little more time to fully consider his position. The panel then adjourned the matter for two days until August 22, 2001 at which time it was expected that Mr. Olschewski would have made his decision. On August 20, 2001 Mr. Pereira delivered a letter to the Commission requesting a review of the registrar's refusal to grant the transfer.

On the morning of August 22, 2001 the hearing was reconvened. At that time Mr. Saxberg advised the panel that he would be representing Mr. Pereira. Having just been retained Mr. Saxberg was not in a position to proceed with the hearing into the allegations against his client. New dates were then set for the hearing of the allegations. The first dates which were mutually acceptable to Mr. Saxberg and Commission staff were November 13 through 16, 2001 inclusive. The matter was accordingly adjourned until Tuesday, November 13, 2001. While the suspension resulting from the registrar's refusal to approve the transfer remained in place Mr. Saxberg advised the panel that he would be seeking a date in the near future for a review of that decision. The review was eventually scheduled for the morning of Wednesday, September 19, 2001 and arguments were heard at that time.

A review of a decision of the registrar is in effect a hearing de novo. The panel may review the stated basis for the registrar's decision and may hear new evidence. No oral evidence was

presented at the hearing of September 19, 2001. Documentary evidence was received in the form of Exhibit 1, a Certified Statement of the Registrar containing eleven schedules marked as "A" through "K" filed by staff counsel. Both counsel also provided written briefs of their arguments which were of significant benefit to the panel.

Allegations

A review of the registrar's refusal to grant a transfer of registration is made under s.29(1) of the Securities Act. The registrar's letter of July 20, 2001 (Schedule "T" to Exhibit 1) refers to the allegations against Mr. Pereira. At that time allegations had been made against Pereira arising out of two real estate transactions. One allegation was that he failed to disclose particulars of his personal involvement in a purchaser's financing arrangements. The second allegation was that Pereira was responsible for the preparation of a false "gift letter" provided to a mortgage lender as confirmation of a purchaser's financial resources.

The registrar, without determining the validity of the allegations against Pereira, nonetheless took them into account when refusing to allow the transfer. He stated the following in his letter:

"The Allegations suggest a blatant disregard of the fundamental requirement expected of a professional agent to provide full and accurate disclosure in offers as well as a lack of trustworthiness and integrity on your part in dealing with the public. These basic requirements are stressed in the pre-licensing course that you were required to complete to qualify for registration.

The Allegations will be dealt with at the hearing in August, and it is not my function to determine their validity. In considering the Application, however, I am not prepared to disregard the Allegations since they raise serious questions as to your suitability for registration.

Consumers are entitled to believe that the real estate agent they are dealing with is a person of honesty and integrity. It is my responsibility as Registrar to endeavor to maintain an acceptable level of integrity on the part of registrants and public trust in the real estate industry.

As such, I must advise that I am not inclined to approve the Application, and you are hereby notified."

By the time of the hearing of September 19, 2001 the number of allegations against Mr. Pereira (and his associate Lopes) had grown from two to six. Five of the allegations deal with transactions in which Pereira prepared, or was noted as agent on, an offer to purchase.

Certain mortgage lenders will grant mortgage funding to purchasers of limited resources if they can demonstrate that all or a part of the required down payment is being funded through a gift. A gift is usually from a family member. A letter evidencing the gift (to be signed both by the donor and the prospective purchaser) must indicate clearly that the advance is an outright gift with no repayment required.

The allegations surrounding the six transactions considered by the panel are set out in the Amended Amended Statement of Allegations dated August 14, 2001. In one transaction Pereira

is alleged to have counseled a purchaser and her relative to sign a gift letter when in fact it was known by all parties that no money was changing hands between them. In the balance of the transactions Pereira is alleged to have provided gift letters to mortgage lenders purported to be signed by the purchaser and the donor when in fact the purchaser had no knowledge of the existence of such a letter. In more than one transaction the purported donor did not even exist. In no case was there an actual gift of money changing hands as suggested in the gift letter.

The allegations do not suggest that mortgage financing was actually advanced on the basis of any of these letters. The allegations suggest that in at least one case the purchaser thought better of the transaction and cancelled it and in other cases the lending institutions' own investigations uncovered the fact that the letters were apparent forgeries.

Argument of Appellant

Mr. Saxberg pointed out that his client has been suspended for a period of three months without the benefit of a hearing or a finding of fault against him. During this period of suspension he has been unable to earn a livelihood in his chosen profession. As a result, Mr. Pereira and his family are suffering financial hardship. Mr. Saxberg argued that the panel must consider a balance of public interest and the registrant's right to earn a livelihood. He stated that this is especially so in the area of interim suspensions where a full review of the evidence surrounding the allegations has not been conducted.

Mr. Saxberg referred the panel to several authorities which urged tribunals to exercise caution in denying an individual the ability to earn a living through suspension pending a hearing. It was suggested that such a suspension, even though it may be brief could have serious and permanent affects on a registrant's reputation and career. Public interest concerns must clearly outweigh the individual's rights in order to sustain an interim suspension. On this point counsel referred the panel to *Chen v. The Law Society of Manitoba*, a 1999 decision of Mr. Justice Schulman of the Manitoba Court of Queen's Bench. This was a case of an interim suspension of a lawyer by The Law Society of Manitoba. Mr. Justice Schulman, in upholding the interim suspension, held that the test should be whether there is a significant risk that the public would be harmed if the interim suspension were not ordered.

Mr. Saxberg argued that in order to sustain the suspension before a hearing the panel must be satisfied that the allegations show the threat of significant public harm and a clear course of conduct by Mr. Pereira. He stated that the allegations revealed neither a threat of damage to the public nor a clear course of conduct on the part of his client. He suggested that the panel allow the transfer of registration, thereby lifting the suspension, on conditions. The conditions proposed are as follows:

- "1. All transactions to be reviewed and supervised by the broker;
2. Commission staff to spot audit transactions;
3. The appellant would be restricted from contacting mortgage brokers and/or having any involvement in arranging financing for clients."

Argument of Staff Counsel

Ms Laycock argued that the question of balancing public protection against an individual's right to earn a livelihood does not apply to securities commissions. She referred to a 1946 decision of

the Ontario Court of Appeal being re: the Securities Act and Morton [1946] O.R.492(CA). In that case the court clearly stated that the prime consideration of the Ontario Securities Commission in the question of suspension was the public interest "and not private interest or the interests of any profession or business". Ms Laycock also cited a more recent decision of the British Columbia Court of Appeal being Rak v. B.C. (1990) 51B.C.L.R.(2d). This case suggests that the obligation of a securities commission to consider public interest is of a greater degree than that of self-regulating professional bodies. The "special regulatory character" of securities commissions requires that they consider public protection as their paramount obligation.

Ms Laycock stated that the seriousness of the allegations together with the Commission's paramount obligation to the public demands that the panel uphold the registrar's refusal to allow the transfer pending the scheduled hearing.

Decision

The fact that public interest is the paramount concern of a securities commission is well known to the panel. Public protection is the prime mandate of this or any other securities commission. That the Commission is dealing in this instance with a real estate registrant as opposed to a securities registrant does not suggest to the panel that any different consideration should apply. Having said that, the panel finds that it would be unreasonable, particularly in the case of an interim suspension, to give absolutely no consideration to the interests of an individual registrant. This panel does accept though, that the two considerations are not equal in the balance. The first concern of the Commission is the broader interest of public protection.

Mr. Saxberg advises that at the hearing in November, 2001 he will present evidence explaining each of the allegations in Mr. Pereira's favour. In the meantime, the panel is faced with very serious allegations that raise public interest concerns. While Mr. Saxberg states that there is no identifiable course of conduct in the allegations, the panel finds the opposite. The allegations suggest a definite course of conduct on the part of Pereira in the falsification of documents. The allegations suggest this is so in the case of five transactions. Nor is the panel provided only with unfounded allegations suggesting such conduct. Exhibit 1 attaches as Schedule "A" a 1996 letter of reprimand from the registrar to Mr. Pereira. One of the bases for the reprimand was that Pereira, "signed (forged) the vendor's name on a listing extension agreement, without the vendor's authority to do so". There is no evidence suggesting that Pereira questioned or disputed this reprimand which suggests an earlier act of forgery by him.

There is a significant potential danger to the public in the creation of false documents and/or forgery of signatures on documents. This is not an issue on which the panel feels it must elaborate. The panel is not determining the merits of the allegations; this is left for the hearing. The panel is, however, considering the allegations and the earlier undisputed reprimand for an act of a similar nature in light of the public interest. As in the Chen decision the panel is of the opinion that lifting the suspension pending hearing poses a significant risk that members of the public would be harmed. The allegations will be dealt with in full in less than two months. The panel considered the possibility of reinstatement on conditions during that time but came to the conclusion that there are no conditions which can effectively deal with the issue at hand. The allegations will be considered in full in November and determined either in Mr. Pereira's favour

or against him at that time. In the meantime the balance must favour the public interest. The registrar's decision to refuse to allow the transfer is upheld.

On a side note, it appears evident that Commission staff have been willing to deal with this matter in a reasonable time. The issue has been referred to a hearing on a timely basis on more than one occasion. The fact that the matter could not be dealt with in the month of August was not due to any action or lack thereof by Commission staff. While Mr. Pereira cannot be faulted for the decision of counsel to withdraw at such a late date, it is clear that Commission staff have been willing to accommodate the timely hearing of this matter throughout.

September 26, 2001

"D. G. Murray"

D. G. Murray

Chair

"R. G. McEwen"

R. G. McEwen

Member

"K. S. Kristjanson"

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Member