

September 20, 2002

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

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| 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 |

Background

In Reasons for Decision issued March 18th, 2002 the Panel found against Pereira on all points of the Statement of Allegations. The argument as to costs took place on July 18th, 2002.

Counsel for Pereira was granted leave to call evidence on the question of ability to pay. The only witness called was Pereira.

Staff counsel presented as Exhibit 1 an itemized claim for costs calculated according to Schedule A of Regulation 491/88R to The Securities Act. The Itemization of Costs, less the balance of the attachments making up Exhibit 1, is attached to these Reasons. The costs or "fees" claimed are \$41,053.50 for attendances at hearings, time spent by investigators and staff counsel in preparation and costs for witness fees and transcripts.

Staff counsel asked for an order of costs for the full amount. The Panel was also asked to exercise its discretion under Section 34(2) of The Real Estate Brokers Act and maintain Pereira's suspension, due to be lifted as of September 22, 2002, until the costs ordered are paid.

Counsel for Pereira argued that the sum was unreasonably high. He requested that the claim for costs be reduced by the Panel. He raised the following arguments:

1. The length of the hearing was extended unnecessarily;
2. Conduct of Commission staff should be a consideration in setting costs payable to the Commission; and
3. Costs of an administrative hearing should not be set so high as to be an impediment to offering a defense to allegations.

These points are considered below.

1. Length of hearing

Counsel for Pereira argued that staff counsel could have cut several days off the hearing. He stated that his client did not dispute most of the facts brought out in evidence, or as alleged, and that it was therefore not necessary for staff counsel to call 13 witnesses over four days to put in her case. He suggested that an agreement as to facts could have been tendered along with agreed documents. He argued that the Panel should reduce any order of costs accordingly.

The Panel does not accept this argument. While an agreed statement of facts could have been prepared, it would require input from both counsel. There was no obvious attempt to develop such a document.

The initial four day hearing (November 13-16/01) was set in the month of August. No suggestion was made to the Panel that over the next three months any effort was made by either counsel to develop an agreed statement of facts or a list of documents to go in by consent. In fact, the correspondence between counsel showed that both were preparing for a contested hearing. Counsel for Pereira was asked on more than one occasion to provide an outline of his client's anticipated testimony. This was provided, in the form of a 14 page document, on November 9th, the last working day before the commencement of the hearing. It was provided along with a list of seven witnesses expected to be called on Pereira's behalf.

In addition, some of the anticipated testimony outlined in the 14 page document contradicted the testimony expected of witnesses from staff counsel. When Pereira finally did testify, in January, 2002, some of his testimony was different than that which was set out in the November 9th document. In addition, on November 13th, in an opening address to the Panel, counsel for Pereira indicated that he intended to call evidence showing that his client had not forged documents. In testimony in January, 2002, Pereira acknowledged the forgeries.

After all of the evidence was in, and Pereira confirmed much of the testimony of witnesses called by staff counsel, it did appear clear to the Panel that time saving agreements as to facts and documents could have been worked out. This, however, would have required co-operation in that direction prior to the hearing, which was not evident. The Panel finds that it was necessary for staff counsel to call her witnesses and tender the documents through them over the course of four days.

There were, in fact, an unusual number of appearances in this case for which the Panel had to be convened. None of the appearances were unnecessary or due to the actions of Commission staff. For the most part, the additional appearances were a result of changes of legal counsel on the part of Pereira. All of the appearances have been considered by the Panel in the assessment of costs.

2. Conduct

Counsel for Pereira questioned the conduct of Commission staff on two points. He suggested that there was improper or unfair conduct. In the first instance, two witnesses suggested in cross examination that they believed that if the Panel made a finding against Pereira they would not have to repay down payment loans they received through him. The witnesses suggested that they received this understanding from a Commission investigator. Counsel for Pereira stated that this type of suggestion could color the witness's evidence in attempting

This allegation, if accepted, could affect the credibility of these witnesses, but the Panel does not find that it could or should be a factor as to costs. The evidence of these witnesses tended to show that Pereira obtained down payment loans for them in contravention of the CMHC program. There was ample corroborating evidence that he did so. The only dispute was whether the advances should be characterized as loans. The Panel found against Pereira on this point.

Obviously, a Commission investigator should not suggest to anyone that a finding against a respondent would negate a requirement to repay a loan. However, the investigator, who was present throughout most of the hearing, was not asked to explain these allegations and based on the testimony given, the Panel is not inclined to believe that any improper suggestions were made by him, whether intentionally or otherwise.

The other allegation of unfair conduct by Commission staff arises out of steps taken by staff counsel after closing her case on November 16, 2001. On two occasions, prior to the scheduled re-commencement of the hearing (on January 9th, 2002) she summoned an individual on Pereira's witness list to answer questions under oath. Transcripts of these sessions were produced. Counsel for Pereira argued that this action was intended to "bind" this witness' testimony. As a result, he felt he was unable to call this individual as a witness. He believed that the Panel should consider these actions as a reason for reducing costs.

Staff counsel have wide powers, not available to members of the private bar, to compel the giving of evidence. These powers should not be used in a manner that is patently unfair. In this case the Panel does not find that the action was unfair. The Panel was advised that after staff counsel's case was closed, she was informed by counsel for Pereira that the individual in question had in his possession a document not available over the first four days of the hearing. Staff counsel advised the Panel that this document led to a series of questions and that staff counsel used the powers open to her to obtain answers to these questions.

While staff counsel had closed her case, the hearing had not concluded. It was still open to her, in January, 2002, to seek leave to reopen her case in the event answers to the questions arising out of the new document tended to show any additional improprieties on the part of Pereira. In the event the additional information would have resulted in new allegations being framed it

would have been open to counsel for Pereira to seek an adjournment for the purpose of answering these allegations.

The Panel finds that staff counsel used the investigative tools open to her in an appropriate manner

3. Amounts of costs

Counsel for Pereira argued that \$40,000.00 plus, is simply too high a sum for costs to be set in an administrative hearing. This is a large sum, however, it is based on the guidelines set out in the Regulations and it is within the discretion of the Panel to order.

Counsel for Pereira stated that costs should be reduced because the result was divided. While staff counsel proved all points of her case, she asked for a minimum five year suspension of registration, which the Panel declined. The Panel ordered a 15 month suspension, closer to the 12 months requested on behalf of Pereira's counsel. Reference was made to two other Commission decisions (Tetrault and Finlay) where the results were divided. In each case this resulted in a reduction in the costs that could have been assessed. In fact, it was pointed out, in the Finlay case, while assessable costs were in the range of \$16,000.00, due to the fact that there was a mixed result, staff counsel only requested an order in the sum of \$4,000.00.

The Panel has taken this argument into consideration, however, it should be noted that there is a distinction between those cases and the Pereira matter. In both Tetrault and Finlay, after a full hearing of the evidence, the Panel found that staff counsel had not made out all of the allegations against the respondents. This is not the case in the Pereira matter. After the hearing it was found that all points of the allegations had been proven.

Counsel for Pereira also noted that of the costs claimed, almost \$17,000.00 were on account of staff investigation and hearing preparation. He noted that large claims for costs for these activities had not been brought forward in past cases. He specifically referred to the Finlay decision where the claim put forward by staff was only for hearing time and no claim was advanced for costs of investigation or preparation.

Finally, counsel for Pereira argued that, as a matter of principle, costs in proceedings before the Commission should not be set at such a level that they would be punitive or discourage a respondent from taking advantage of the legal right to defend against allegations brought by the Commission. It was pointed out that a Panel of the Commission had expressed similar sentiments in the Tetrault decision. It was also pointed out that the hearing had to take place, from the point of view of Pereira, as the position of staff counsel leading up to the hearing was that any settlement must include a minimum five year suspension. Pereira's counsel argued that his client should not be unduly penalized in costs by insisting upon exercising his legal rights at a hearing, particularly in view of the actual penalty assessed by the Panel.

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In the final analysis, the decision as to whether costs should be levied and in what amount, is left to the discretion of the Panel. In the present instance the Panel is not inclined to award the full amount being sought. It is a very high number and contains a large component of costs in an area which has not regularly been sought in past decisions, being the costs of investigation and preparation. At the same time, the Panel acknowledges that these are areas that cannot be ignored, as large amounts of time are invested by Commission staff. In addition, while costs should not be punitive they must be realistic. It has been stated by other Panels that when a respondent chooses to go through a hearing he or she must expect to bear reasonable, and sometimes substantial, costs in the event the findings are against him or her.

In this case, after review of all the evidence before it, the Panel feels that a reasonable order of costs is \$20,000.00, all inclusive.

While staff counsel asked that the Panel include an order that Pereira's suspension continue until such time as the costs awarded are paid, the Panel declines to make such an order. The Panel heard extensive evidence of Pereira's financial situation. He has significant debts including income tax arrears, he has no assets to speak of and his residential property is fully mortgaged. The Panel is satisfied that requiring him to pay the costs awarded prior to reinstatement would be tantamount to instituting an indefinite period of suspension. If the Panel thought this was appropriate it would have done so directly in the Reasons for Decision of March 18th, 2002 as opposed to a suspension of 15 months.

At the same time, if Mr. Pereira is going to continue his career in real estate, the costs will have to be paid. It is ordered that they be paid in instalments of a minimum of \$5,000.00 per year to be payable prior to the anniversary date of Mr. Pereira's reinstatement. Any failure to comply with this order will result in a suspension until such time as the payment is made. Mr. Pereira is free to accelerate the payments if he is able.

Should Mr. Pereira not seek reinstatement of his registration within three months of September 22, 2002, the entire award of costs will become due and payable forthwith.

September 20, 2002

"D. G. Murray"

D. G. Murray
Chair

"R. G. McEwen"

R. G. McEwen
Member

"K. S. Kristjanson"

K. S. Kristjanson
Member