

28 September 2018

IN THE MATTER OF: THE REAL ESTATE BROKERS ACT

- and -

**IN THE MATTER OF: JOSE ANTONIO PEREIRA also known as
JOE PEREIRA**

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

Panel:

| | |
|--------------|-------------------------|
| Panel Chair: | Mr. J.T. McJannet, Q.C. |
| Member: | Ms. A.M. Magnifico |
| Member: | Mr. R.D. Bell |

Appearances:

| | | |
|--------------------|---|------------------------------|
| Ms. K.G.R. Laycock |) | Counsel for Commission Staff |
| Mr. K.M. Saxberg |) | On behalf of the Respondent |

Background

This matter came up for hearing on June 11,12 and June 15, 2018 and was adjourned on June 15 subject to the possibility of additional argument being presented mainly on the question of costs.

The hearing revolved around and arose out of the possible purchase of a single-family home located at 70 River Pointe Drive in Winnipeg (the "Home"). In January 2014, Mrs. Elena Ionita ("Elena") and her husband were looking to purchase a single-family home in Winnipeg. Elena retained Mr. Jose Antonio Pereira ("Pereira") as her real estate agent to assist her. Elena stated that she and/or her husband had previously engaged Pereira as their real estate agent in several real estate transactions. She stated that she was satisfied with his past performance and that she trusted Pereira to continue as her real estate agent at the time she and her husband were considering the purchase of the Home.

Ultimately, with Pereira's help she and her husband visited the Home and it was decided that Elena alone would put in an Offer to Purchase on the Home. Pereira was advised of this decision and an Offer to Purchase the Home was prepared and executed by Elena alone as purchaser.

Pereira, as Elena's real estate agent, was actively involved with Elena in completing the Offer to Purchase. Elena signed and delivered to Pereira her deposit cheque, blank as to detail, and she authorized Pereira to fill in the deposit cheque and present the Offer to Purchase and the deposit cheque to Sutton Realty, ("Sutton") real estate agent for the owner of the Home (the "Home Owner"). The purchase price

was \$750,000.00 subject to certain conditions including time allowed to 5:00 p.m. on January 16, 2014, for Elena to arrange mortgage financing. The Home Owner deleted certain conditions in the Offer and counteroffered at a purchase price of \$725,000.00 which was accepted by Elena. Ultimately mortgage financing was not arranged so the Offer to Purchase was terminated and Sutton was asked to return Elena's deposit of \$20,000.00.

Timeline:

1. Offer to Purchase executed by Elena on January 4, 2014;
2. Counteroffer executed by owner on January 6, 2014 at 2:00 p.m.;
3. Counteroffer accepted by Elena on January 6, 2014 at 6:00 p.m.;
4. Deposit Release Form addressed to Sutton requesting the return of the \$20,000.00 deposit signed by Elena and the Home Owner on January 16, 2014;
5. Sutton \$20,000.00 deposit return cheque (the "Return Cheque") issued to Elena Ionita dated January 21, 2014;
6. Return Cheque picked up from Sutton by Pereira on January 21, 2014, signed on the back by Pereira and deposited by Pereira on January 21, 2014 to his personal account.

Allegations:

Staff Counsel allege that Pereira in connection with a trade or transaction in real estate has committed one or more fraudulent acts, as "fraudulent acts" is defined in section 1 of the Real Estate Brokers Act ("Manitoba"), the Act, in that:

- (a) he failed, within a reasonable time, to account properly for and/or pay over to Ms. E her deposit refund cheque and/or the monies

represented thereby in the amount of \$20,000.00 in contravention of clause (c) of the definition;

- (b) he intentionally misrepresented a material fact by his conduct in taking money which was his client's and treating it as his own by endorsing a cheque made payable to his client and depositing it into his own personal account in contravention of clause (a) of the definition;
- (c) by means of an artifice or scheme, he obtained money through wrongful or dishonest dealing by obtaining and depositing to his own personal account a deposit refund cheque intended for Ms. E,* and payable to her, by endorsing the cheque with his own name and depositing the cheque into his own personal account, following which said monies were expended by him for his own personal use in contravention of clause (i) of the definition, and/or;
- (d) by means of an agreement to borrow money from his client Ms. E, said money having been generated by a deposit refund cheque received by Pereira but intended for Ms. E, thereby obtaining money by wrongful or dishonest dealing in contravention of clause (i) of the definition;

Staff Counsel requests the Commission to order:

1. That the Manitoba Real Estate Association Inc. ("MREA") pay to Elena out of the MREA Reimbursement Fund the sum of \$20,000.00;
 2. In the public interest the registration of Pereira be suspended or cancelled;
and
 3. Costs.
-

*Note: Ms. E as above referenced is Elena

Staff Counsel maintains that the evidence shows that Pereira has committed a “fraudulent act” in picking up the Return Cheque, signing the Return Cheque and depositing the sum of \$20,000.00 to his personal account, without Elena’s knowledge or consent.

Testimony

When Elena signed the Deposit Release Form on January 16, 2014 she had withdrawn her Offer to Purchase and understood she was signing the Deposit Release Form for the return of her \$20,000.00 deposit cheque. She stated that no agreement, verbal or otherwise, was made that day.

Elena’s evidence is that on January 24, 2014 she did agree to lend Pereira the sum of \$20,000.00 deposit monies, three (3) days after Pereira had picked up and deposited the \$20,000.00 Return Cheque to his personal account without her knowledge and consent. On that occasion she stated that Pereira asked if he could use the cheque money to pay down a debt to Revenue Canada. Elena also stated that when she asked Pereira how he could cash the cheque and use the money if she had not given it to him, Pereira responded not to worry – that he would deal with it.

She testified that she never saw the return cheque, never signed the cheque nor gave it to Pereira, and that it was only when Commission staff showed her the

deposit return cheque (endorsed by Pereira) that she realized how he had obtained the \$20,000.00 on January 21, 2014.

Elena's evidence was that initially she was not sure of the actual date of January 24th but a talk with her husband, while still giving evidence, refreshed her memory such that she stated it was on January 24, 2014 that there was a verbal agreement to lend \$20,000.00 to Pereira and at the same time set the terms of the loan.

Mr. Saxberg, counsel for Pereira, stated that Pereira's evidence is that Elena agreed to lend the \$20,000.00 to Pereira at a meeting attended by Elena, Elena's husband and Pereira on January 16, 2014 at which time the Deposit Release Form was signed by Elena and she agreed to lend the \$20,000.00 deposit to Pereira on terms that were agreed to. Pereira stated that a loan agreement was prepared and signed by all parties present. No such agreement was presented at the Hearing.

Neither Ms. Laycock nor Mr. Saxberg chose to call Elena's husband as a witness in these proceedings.

Findings

There is agreement by both parties that the \$ 20,000 deposit monies became a loan from Elena to Pereira. The question is, when did that loan agreement occur - before the encashment of the deposit return cheque or after, and specifically on what day in January 2014? That is the central issue in this proceeding, and on this central issue there is confusing and contradictory testimony by both parties with no third-party

corroboration for either. While Elena believes the loan agreement was made on January 24, 2014 following her return from a family trip to Toronto, Pereira maintains that the agreement was made on January 16, the same day Elena signed the Deposit Release Form. Pereira also claimed that Elena handed him the deposit cheque that day. On balance it appears more likely that the loan agreement meeting took place on January 24, 2014.

It does strain credulity, that having previously asked Pereira how he could obtain the deposit monies without her giving him the Return Cheque, Elena never followed up on how Pereira obtained these monies. In any event, during 2014 and 2015 Elena received some loan repayments from Pereira totaling some \$9900. She stated that she asked Pereira to check his records as to payments he had made to her and requested that he make the repayments on the loan as had been agreed. Given Pereira's state of bankruptcy as of November 2015, it seems apparent she realized that her only possibility of repayment of all her loan to Pereira would be through the provisions of the Act and of the MREA Reimbursement Fund.

Evidence was presented that Pereira had substantial debts to various creditors during the period leading up to the events in January 2014. There is also evidence provided by both parties of an existing friendship and business relationship between Elena, her husband and Pereira dating back many years. They trusted each other, although the relationship was closer between Pereira and Elena's husband. Pereira therefore asked for the deposit return money to be considered as a repayable loan. But instead of waiting a few days to discuss his request for a loan from his client and friend given her absence in Toronto, he decided on January 21, 2014 to pick up the deposit cheque made payable to Elena, to sign his name on the back of this cheque

and deposit it into his personal bank account via a bank deposit machine. It was Pereira's actions on

January 21, 2014 in the handling of deposit return monies which rightly belonged to his client and his client only, that constitute a technical breach of the words "fraudulent act" as defined under the Act.

Decision:

We note that Pereira commenced his career in real estate in 1991 and has been recognized for his service. We are also mindful that Pereira has been the subject of previous Orders of this Commission which included reprimands, suspensions and warnings in the event of future improprieties, his last transgression having occurred in 2002. There have been no allegations of misconduct until the filing of the complaint in 2016 which is the subject of these proceedings. We are also aware that Pereira remains an undischarged bankrupt. In addition, Pereira admitted during the hearing that he erred in handling the Deposit Return Cheque and that he must be more diligent with his finances.

Pereira's evidence indicates that on or about January 16, 2014, he discussed with Elena's husband the possibility of Pereira borrowing the \$ 20,000 deposit as a loan. Pereira indicated he thought that Elena's husband indicated agreement to the loan and it appears he jumped to the conclusion that agreement from Elena's husband was tantamount to receiving Elena's agreement as well.

We find that Pereira exercised poor judgment but did not act dishonestly; rather he acted in the mistaken belief that he had arranged a loan with Elena's agreement. Notwithstanding these mistaken beliefs, we find that Pereira committed a technical breach of the words "fraudulent act" within the meaning of the Act.

The Panel notes that we "may" order the MREA to pay monies out of the Real Estate Reimbursement Fund. However, as Elena's deposit was converted to a loan upon agreement of the parties, it is "not a trade or transaction in real estate" and therefore does not fall within provisions of section 39 of the Act. The Request for this order is therefore refused. In our opinion the authority granted under section 39 would cover capital loss only and not include any amounts for interest lost and for costs incurred.

Accordingly, this Panel finds that it is in the public interest that Pereira shall be barred from being a real estate broker for a period of three (3) years commencing September 29, 2018 but shall otherwise be entitled to continue with his present license which expires September 25, 2018, and if he so decides to apply for renewal of that license, to be registered as a real estate salesman under the provisions of the Act subject to the following:

- a) Within six (6) months of that date upon which Pereira's "real estate salesman" license is renewed, Pereira is to provide and satisfy the Registrar that he has successfully re-taken the presently approved Real Estate Course as well as an Ethics course to be approved by the Registrar, and
- b) During the first 12 months of his present and/or renewed license Pereira shall be supervised by his broker who is to report monthly to the Registrar on Pereira's activities in a form and content to be determined by the

Registrar from time to time, and the Registrar shall be entitled to report back to this Panel in that regard for assistance and direction and such other conditions, including cancellation of Pereira's license, as this Panel may direct.

"J.T. McJannet"

J.T. McJannet, Q.C.

Panel Chair

"A.M. Magnifico"

A.M. Magnifico

Member

"R.D. Bell"

R.D. Bell

Member