



THE MANITOBA
SECURITIES
COMMISSION

IN THE MATTER OF: THE REAL ESTATE BROKERS ACT

-and-

IN THE MATTER OF: LEAD PROPERTY MANAGEMENT INC.

Decision on Motions – dated December 7, 2021

Panel:

Chair: Linda Vincent

Member: David Huberdeau-Reid

Appearances:

Mr. C. Besko) Counsel for Staff of the Commission
)

No counsel) Manitoba Real Estate Association
listed on the brief)

Introduction

On November 19, 2021 the parties to this matter, Staff of the Manitoba Securities Commission (Staff) and the Manitoba Real Estate Association (MREA) filed written briefs to the panel (Hearing Panel). This relief is requested in the midst of a hearing (Hearing) that commenced in January 2020.

The relief requested included the following:

1. A request by MREA to be permitted to withdraw as a party to the Hearing;
2. A request for an order that the MREA be directed to pay out, from the Manitoba Real Estate Reimbursement Fund (Fund), defined in section 39.1(1) of the *Real Estate Brokers Act* C.C.S.C.cR20 (the "Act") the sum of Two Hundred and Seventy-Eight Thousand Dollars (\$278,000), plus an additional fifteen percent (15%); and
3. An outline of Staff's proposed next steps in the hearing of this matter.

For the reasons set out below, the Hearing Panel has determined that:

1. the MREA be permitted to withdraw as a party;
2. due to the lack of necessary evidence, it is premature at this time to make an order directing the payment of any monies from the Fund; and
3. while the Hearing Panel is prepared to allow some changes to the evidence it will receive at the resumption of the Hearing, it does not agree with all of the proposed processes outlined by Staff in its brief.

Background Facts

1. On June 23, 2014, a Notice of Hearing and a Statement of Allegations were issued by the Manitoba Securities Commission (Commission) against Lead Property Management Inc. ("Lead"). The allegations concern activities and matters that date back to 2010.
2. On March 16, 2015, an Amended Statement of Allegations was issued by the Commission against Lead.
3. On May 29, 2015, a hearing panel of the Commission, comprised of different Commissioners than the Hearing Panel, decided, on a motion brought by the MREA to grant the MREA status as a party in the matter.
4. On November 20, 2019 a hearing panel of the Commission, comprised of different Commissioners than the Hearing Panel, considered a settlement agreement between Staff and Lead. That settlement agreement was accepted by that hearing panel. A separate order did not issue; that is, the hearing panel accepted the proposed settlement agreement without any further directions or statements.

5. On January 8, 2020 the Hearing commenced and, due to the settlement referenced above, included as parties Staff and the MREA.
6. Counsel for Staff called Victor George Neufeld (the "Expert") as an expert witness. The Expert was retained in 2012 and completed a written report (the "Report") in 2014.
7. The Report was entered as an exhibit to the Hearing. Section 4.1 of the Report lists the "*Information Relied Upon*". That information is not detailed by document, but rather is set out in five bullet points that include many documents and information. Two of the bullet points included documents and information that had not been filed as exhibits to the Hearing and had not been disclosed to MREA.
8. The Expert began his testimony on January 13, 2020. His evidence was that there were voluminous, disorganized and incomplete records and files for him to review. In addition, his retainer with the Commission, included the instructions that he was not permitted to contact any of Lead's clients or customers (the "Potential Claimants") who may have suffered a financial loss.
9. On January 15, 2020, during an early stage in the cross examination of the Expert, counsel for MREA requested additional disclosure of documents and information from the Expert.
10. On February 19, 2020 and March 12, 2020, the Hearing Panel heard arguments on the MREA's motion for disclosure of additional documents and information from the Expert. Both parties provided a written submission as well as oral argument.
11. On March 20, 2020 the Hearing Panel issued a decision (the "Decision") which provided for disclosure of information and documents by Staff counsel to counsel for the MREA over a period of time that concluded on July 27, 2020.
12. Subsequent to July 27, 2020 the Hearing Panel contacted persons on staff of the Commission to confirm that the requirements of the Decision had been complied with and that the Hearing was ready to resume.
13. The Hearing Panel was advised that none of the requirements of the Decision had been complied with.
14. The Hearing Panel provided Staff counsel and counsel for the MREA with three opportunities, on September 9, October 23, and December 4, 2020, to speak to the matter of varying the Decision.
15. On December 14, 2020 the Hearing Panel issued an order varying the Decision (the "Variance Order") after hearing from both of the parties. The Variance Order provided detailed directions for the disclosure that was required to be provided by Staff counsel to counsel for the MREA.

The additional disclosure was ordered to be provided to allow the MREA to complete the work necessary to complete the cross examination of the Expert.

16. There were two requests made by the Expert for additional time to complete his responses under the terms of the Variance Order which the Panel agreed to. Accordingly, after the additional time, all disclosures should have been made to counsel for the MREA no later than the end of July 2021.
17. Under the terms of the Variance Order the parties were directed to “...attend before the Hearing Panel to set dates for the continuance of the hearing” as soon as practicable thereafter.
18. On October 19, 2021 the parties filed the briefs relative to the relief requested.

Analysis and Decisions

1. Request by the MREA to be permitted to withdraw as a party to this matter.

The MREA sought standing as a party in the matter at a hearing in 2016. As outlined above, an order, dated May 29, 2015 gave the MREA standing as a party.

MREA now argues that that the Act will be replaced with new legislation, which, although it retains the requirement that the MREA maintain a reimbursement fund, statutorily prohibits the MREA from seeking standing as a party to any hearings related to the payment out from that fund. For this reason, the MREA argues that the precedential value of its participation in this Hearing has been reduced.

In its brief, Staff counsel agreed with the MREA's request to withdraw as a party and did not raise the issue of costs.

Although seeking the right to withdraw as a party, the MREA's brief also includes submissions on the balance of the relief sought by Staff.

The MREA's brief does not make its request to withdraw contingent upon the Hearing Panel approving of the other requests of Staff counsel. If its intention was to withdraw only if this Hearing Panel approved of those other requests of Staff, it did not make that clear in its brief. To give it all benefit of the doubt, if the MREA intended to seek leave to withdraw only if the other requests of Staff counsel were granted, it may, within three (3) business days of the date of the service of this decision on it, clarify its intention to remain a party by writing an email to the Secretary of the Commission, advising of that position. In the event such an email is not sent, the MREA will be deemed to have withdrawn as a party to the Hearing, and there will be no costs assessed against it.

The Hearing Panel thanks counsel to the MREA for its valuable assistance in the Hearing.

2. Order of Payment Out from the Fund

As set out above, the Hearing Panel has, to date, heard from only one witness: the Expert, whose evidence had not been completed at the time the Hearing was adjourned in January 2020. The settlement agreement entered into by Lead, and referenced in paragraph 4 to the background facts above, has been filed as an exhibit to the Hearing.

Staff counsel advise that none of the Potential Claimants, which are numbered at approximately one hundred and six (106) persons and companies, have been contacted, notwithstanding the Hearing Panel's directions in the Variance Order. There is currently no evidence from any of the Potential Claimants as to the monies owed to them by Lead. As noted above, the Expert testified that he was restricted, under the terms of his retainer with the Commission, from contacting any of the Possible Claimants.

The relevant provision of the Act reads as follows:

Payment out of fund - fraud or conviction

39.1(2)

Where, in connection with a trade or transaction in real estate, a broker registered on the basis of membership in the association, or an authorized official, employee or salesperson of such a broker,

- (a) is found, upon investigation by the commission or the commission's representative, to have committed a fraudulent act; or
- (b) is a party to civil proceedings in a court resulting in final judgment, based upon a finding of fraud, being given against the broker, authorized official, employee or salesperson; or
- (c) is convicted of an offence under the *Criminal Code* (Canada) or this Act;

the commission may order the association to pay out of the fund such amount to such person or the commission as the order may require, and the association shall comply with the order forthwith.

There is one relevant case in this matter: *Manitoba Real Estate Association v Manitoba Securities Commission and The Strathcona Street Limited Partnership* 1999 CanLII 14216 (MB QB).

In that case, Mr. Justice Wright, in reviewing the statutory provisions in the Act relative to a payment out from the Fund, held that the Commission's authority is subject to the nature and scope of the Fund. At paragraph 25 he held that "...recoverable loss is limited to direct loss arising as a result of the fraudulent and dishonest acts covered by section 39.1(2). The Fund is to reimburse that loss and that loss only."

At paragraph 50, the Court outlined three necessary elements (the "Necessary Elements") that must be in evidence in order for the Commission to order a payment out from the Fund.

"1. *There must be a connection established between the fraud and a trade or transaction in real estate.*

2. *The fraud of Stonehouse giving rise to a reimbursement claim must have occurred after Stonehouse was registered as a real estate agent.*

3. *When the fraud occurred, Stonehouse must have been acting in his capacity as a real estate agent and the Partnership or the limited partners must have been relying on him in that regard.*"

In the case before us, Lead was a property manager, and had separate agreements with each of the Potential Claimants. Accordingly, evidence from the Potential Claimants will be necessary to prove at least the Necessary Element #3.

After setting out the required Necessary Elements, the court then outlined how losses are to be calculated by the Commission. In this respect the court held that "*The objective is to identify the net direct financial loss suffered ...[para 51].*"

The court provided details on how to calculate the net direct financial loss. These details include more than not paying interest on the amounts that are claimed. Based on the calculation of the net direct financial loss, evidence from the Potential Claimants will be required.

The Hearing Panel have noted the comments of Wright, J. at paragraph 63 where he states "*...the Commission does not have to be absolutely precise in arriving at whatever order it chooses to make. The calculations I am now directing it to perform may be difficult to determine in all respects. If there are problems, the Commission should resolve them as best it can, after giving adequate opportunity to the interested parties to make submissions.*"

Given the limited evidence that has been led to date in this Hearing and given that there is no evidence whatsoever from the Potential Claimants, the Hearing Panel does not have the evidence necessary to make the required calculation.

The Hearing Panel has determined that it must have evidence on which to make the calculation of the *net direct financial loss* before it can order a payment out from the Fund.

3. Proposed next steps in the hearing process

With respect to Staff's proposed next steps to complete the Hearing, the Hearing Panel does not accept what Staff has outlined in its brief.

It is clear from the legislation that hearing panels of the Commission are permitted to accept evidence in a manner different from *vive voce* testimony, and that they are not bound by the legal or technical rules of evidence, as is set out in section 5(1) (c) of *The Securities Act (Manitoba)*.

Rules as to hearings

5(1)

For the purposes of a hearing required or permitted under this Act or any other Act of the Legislature to be held before the commission, the following rules apply:

(a) ...

(b) ...

(c) at the hearing, the commission shall receive such evidence as is submitted that is relevant to the hearing, but it is not bound by the legal or technical rules of evidence and, in particular, it may

accept and act upon evidence by affidavit or written affirmation or by the report of an expert appointed by it under this Act;

However, the fact that a hearing panel can set its own processes and not be strictly bound to legal or technical rules of evidence, does not mean that it can, or should, disregard all rules of evidence. Further, and more importantly to the matter before us, this provision does not allow a hearing panel to make findings without the necessary evidence on the record.

Staff counsel's proposed processes would not provide the evidence required to make the required findings under the Necessary Elements, and would not allow the Hearing Panel to determine the "*net direct financial loss suffered*".

While the Hearing Panel is open to discussions on how the required evidence, including evidence of loss by the Potential Claimants, can be obtained, it is not in agreement with the processes Staff counsel has outlined in its brief.

As this Hearing Panel has noted previously, this case is a difficult one, due to the vast number of documents, the number of Potential Claimants and the passage of time from the date the alleged offences occurred. However, the Hearing Panel must adhere to legal precedent and will not circumvent the requirement that necessary evidence be obtained.

Accordingly, the Hearing Panel is directing the following:

1. That the hearing be resumed and the Expert return to complete questioning by counsel and questioning by the Hearing Panel; and
2. The Hearing Panel will then discuss, with counsel for Staff, the appropriate next steps.

Given that the Expert's testimony was interrupted in January 2020 the Hearing Panel urges Staff to bring this matter back to hearing at the earliest possible date.

Dated this 7th day of December, 2021.

"L. Vincent"
Linda Vincent, Chair

"D. Huberdeau-Reid"
David Huberdeau-Reid, Member