

IN THE MATTER OF: THE REAL ESTATE BROKERS ACT

-and-

IN THE MATTER OF: LEAD PROPERTY MANAGEMENT INC.

Variance Order Dated: December 14, 2020

Varying the Decision on Motion for Disclosure dated March 20, 2020

Dates matter argued: September 9, October 23 and December 4, 2020

Counsel for Manitoba Real Estate Association:

Mr. J. B. Kroft

Ms. A. L. Kaufmann

Counsel for Staff of the Commission:

Ms. K. L. Laycock

Introduction

On March 20, 2020 this hearing panel (Hearing Panel) of the Manitoba Securities Commission (Commission) issued a Decision on Motion for Disclosure (Decision). The Decision set out the disclosure requirements to be made by an expert witness called by counsel for Staff of the Commission (Staff counsel) to counsel for the Manitoba Real Estate Association (MREA).

The Hearing Panel was aware, at the time the Decision was issued, that the COVID Pandemic was going to require changes to the operations of the Commission and would increase the time necessary to meet the requirements in the Decision. An allowance for additional time was factored into the timelines in the Decision. The requirements of the Decision were to have been completed on or before July 27, 2020.

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 proceed.

The Hearing Panel was advised that none of the requirements of the Decision had been complied with.

The Hearing Panel called for both parties to appear and heard submissions from both Staff counsel and counsel for the MREA. Ultimately three hearing dates were required, and the parties convened on September 9, October 23, and December 4, 2020.

Background Facts

1. On June 23, 2014, a Notice of Hearing and a Statement of Allegations were issued by the 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 decided, on a motion brought by the Manitoba Real Estate Association ("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 this Hearing Panel, considered a settlement agreement between Staff of the Commission and Lead. That settlement agreement was accepted by that hearing panel. That settlement agreement was not disclosed to MREA prior to its acceptance by that separate hearing panel and MREA was not involved in the terms and provisions of that settlement agreement.
5. On January 8, 2020, the Hearing Panel commenced the hearing of the matter ("Hearing"), which, due to the settlement referenced above, includes as parties Staff of the Commission ("Staff") and the MREA.

6. Counsel for Staff called Victor George Neufeld (the "Expert") as an expert witness.
7. The Expert's report ("Report") was entered as Exhibit #18. 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 include documents and information that have not been filed as exhibits to the Hearing and have not been disclosed to MREA.
8. The Expert was retained in 2012 and completed the Report in 2014. Since that date he has not had access to his working papers or the laptop he worked on in preparing the Report.
9. The Expert began his testimony on January 13, 2020. On January 15, 2020, during the cross examination of the Expert, counsel for the 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 an oral argument. The written submission of MREA relative to the motion is marked as Exhibit #28 and the written submission of Staff relative to the motion is marked as Exhibit #29.
11. On March 20, 2020 the Hearing Panel issued 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 proceed.
13. The Hearing Panel was advised that none of the requirements of the Decision had been complied with. To date, no explanation has been provided to the Hearing Panel by Staff counsel as to why the requirements of the Decision were not complied with and/or why a request for an extension of time to comply with the requirements of the Decision was not made.
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. Staff counsel has consistently taken the position that she is unable to speak to the Expert as he is in the middle of cross-examination. The Hearing Panel directed Staff counsel to the two Endorsements in **Ultracuts Franchises Incorporate v Magicuts Inc.** et al dated November 7, 2018 and April 24, 2019, to assist her in understanding that she is required to work with the

Expert, including by explaining the requirements of the Decision. Staff counsel continued to state that she could not be compelled to speak to the Expert. The Hearing Panel notes that Staff counsel did not refer to any case law or precedent but repeatedly stated that she “cannot be put in the position” of speaking to the Expert at this stage in his testimony.

Two Options

The Hearing Panel has two options at this point. It could find that due to the non-compliance with the Decision, the MREA has been precluded from the documents and information required to conduct a full and fair cross-examination of the Expert and therefore the evidence of the Expert should be removed from the hearing record. Staff counsel would be entitled to proceed with the hearing but would not have benefit of the evidence of the Expert and/or the Report.

The second option is to provide more detailed information to the Expert and to Staff counsel and vary the Decision by setting set amended timelines.

The Hearing Panel has determined that it is in the best interests of the public to vary the Decision, set amended timelines and provide more detail and instruction to the Expert and to Staff counsel. The Hearing Panel has also decided to set out its expectations for the balance of the hearing procedures.

The Expert and the Jurisdiction of the Hearing Panel

The Hearing Panel notes that none of the delay, including the failure to adhere to the requirements of the Decision, is in any way due to the Expert.

To the contrary, from the emails provided to the Hearing Panel, it is clear that the Expert made many proactive attempts to get information and assistance from Staff counsel and other persons at the Commission immediately following the issuance of the Decision. The Expert was not responded to by persons on the staff of the Commission in a timely or appropriate manner.

As late as December 4, Staff counsel advised the Hearing Panel that the Director of the MSC had still not determined whether there were any “government” impediments that would preclude the Expert from using a third-party contractor of his choosing to perform the necessary work to scan or copy the documents and information that will be required to be added to the Lists (as defined below).

The Expert has gone to considerable lengths to attempt to comply with the requirements of the Decision, including making himself available to the Hearing Panel during times of significant personal stress.

The Expert has provided thoughtful, relevant, and valuable suggestions on how he could most optimally and expeditiously provide the disclosure of documents and information required by the Decision.

Order

The Hearing Panel orders the following:

A. Section #1, paragraphs c., d., e., f., g., and h., of the Decision are deleted and replaced by the following:

c.

- i) The Expert is to prepare and provide two lists of documents. The first list ("List One") is to include all foundational documents which include all instructional and foundational information, including all directions, instructions and assumptions received and/or reviewed in forming the expert opinion, in whatever form such opinion and documents may exist, including but not limited to, electronic information, paper documents, hand-written notes, audio tapes or similar. If any instructions or information were provided verbally to the Expert, by Staff counsel or anyone else, and such instructions or information were used by him in preparing the Report, the Expert is to reduce to writing such instructions and/or information in a document which is to be included in List One and provided to counsel for the MREA.
- ii) List One is to be sufficiently detailed to allow for a clear identification of which documents and information are referred to. It will not suffice to merely refer to a box number, a binder number or similar. The Hearing Panel appreciates that this may be a time-consuming process, but one that is required. Each document and information must be marked and identified, by number or letter, such that it can be easily cross-referenced to List One.
- iii) List One is to be completed and provided to counsel for the MREA and Staff counsel, at the same time, within ten (10) weeks from the date this Variance Order is issued. The Expert is to provide copies (scanned or photocopied, at the discretion of the Expert) of each document and information referenced in List One to Staff counsel only. The Expert is also to file List One with the Commission.
- iv) Within two (2) weeks of the date List One is provided, Staff counsel is to prepare and have sworn, an Affidavit by the Expert that will attach List One.

Within this same two (2) week period, Staff counsel is to provide counsel for the MREA with a copy of the sworn Affidavit attaching List One and shall provide details as to which documents or information are being challenged as not being properly disclosable and why. Sufficient care should be taken by Staff counsel in listing the details as it will be the only evidence permitted in the event that counsel for the MREA takes issue and argues to this Hearing Panel that such documents and information should be disclosed.

- v) Within two (2) weeks of the receipt of the sworn Affidavit with List One and the correspondence from Staff counsel as provided for in subsection iv) above, counsel for the MREA will determine whether it will be challenging any of the documents and information deemed not disclosable by Staff and if it takes the position that it is entitled to one or more of the said documents and information, it is to file a motion to the Hearing Panel to be heard on the matter.
- vi) The second list (List Two) is to include all other documents and information that the Expert relied upon to prepare the Report, whether or not said documents and information are referenced in the Report. The Expert has already testified that these documents and information will be a subset of the boxes and binders and other materials which have already been marked as Exhibits in the hearing by Staff counsel.
- vii) List Two, together with copies of the documents and information in List Two (scanned or photocopied, at the discretion of the Expert) is to be completed and provided by the Expert to Staff counsel and to counsel for MREA, at the same time and within twenty-six (26) weeks from the date this Variance Order is issued. The Expert is also to file List Two with the Commission.

In the submission made to the Hearing Panel on December 4, 2020, Staff counsel argued for a period of fourteen (14) weeks to review List Two and determine if redaction or deletion of any of the documents and information listed would be required. The Hearing Panel does not agree. As the documents and information contained in List Two will be a subset of documents and information which Staff counsel has already entered as exhibits in the Hearing, there will be no redactions or deletions permitted. As there will be no redactions or deletions permitted, both parties, Counsel for the MREA and Staff counsel, are to receive List Two and a copy of each of the listed documents and information at the same time.

- viii) Within two (2) weeks of the twenty-six (26) week period referenced in vii) above, Staff counsel is to prepare and have sworn an Affidavit by the Expert that will attach List Two. Within the same two (2) week period, Staff counsel is to provide a copy of the sworn Affidavit to counsel for the MREA.

B. The time from the issuance of this Variance Decision to the completion of the disclosure work required is approximately twenty-eight (28) weeks in total. The parties are, as soon as possible following the twenty-eight (28) week period, directed to attend before the Hearing Panel to set dates for the continuance of the hearing.

C. The Commission is to provide the Expert with his laptop and his working papers forthwith. These were always the property of the Expert and should never have been withheld from him.

- D. The Expert, and/or a third-party provider chosen by the Expert, is entitled to remove from the Commission premises the necessary documents and information to permit him to prepare List One and List Two and to copy or scan the relevant documents and information. The Expert is entitled to retain a third-party provider of his choice, to scan the documents and information and/or to photocopy the documents and information. The third-party provider will be chosen by the Expert but will be paid for by the Commission. The Commission is further directed to provide all staff resources as the Expert may require and request as he completes the work under this Variance Order.
- E. A copy of this Variance Order is to be served on the Expert within two (2) business days of the date it is signed.
- F. In all other respects the provisions of the Decision remain in effect.

Further Directions on the Hearing

From the initial events that occurred in 2010 when problems came to the attention of the Commission, this matter has been ongoing for approximately 10 years. The Expert was retained in 2012 and completed the Report in 2014. A different panel of the Commission made the decision to add the MREA as a party in May 2015. It was not until November 2019 that any significant steps were taken, by setting this matter down for hearing.

We are advised by Staff counsel that there are up to one hundred and six (106) entities who may have suffered a loss (the "Possible Complainants") for which compensation may be ordered to be paid out under section 39.1(2) of *The Real Estate Brokers Act*, R.S.M. 1987, c. R20. Staff counsel has also advised that the Possible Complainants have not yet been contacted by the Commission as to the possible compensation amounts. The Expert testified that he was not permitted, under the terms of his retainer with the Commission, to contact any of the Possible Complainants during the course of his work

On the first day of the hearing, Staff counsel outlined suggested procedures for the hearing. After calling the Expert witness, Staff counsel advised of her intention to send out letters to each of the Possible Complainants, setting out the amount(s) that the Expert believed each was owed, and then letting each of them "*have their say*".

Staff counsel further suggested that she would ask the Hearing Panel to approve the form of letter to be sent to the Possible Complainants at the conclusion of the Expert's testimony.

The Hearing Panel does not agree with this proposal. Staff counsel is directed to be ready to proceed with the balance of the required evidence following the cross examination (and any permitted re-direct) of the Expert. Staff counsel's obligation is to ensure that admissible evidence is brought forward to prove all elements of the case, including proof of compensable loss for each of the Possible Complainants.

Staff counsel must call properly admissible evidence. Witnesses are to be called to give *viva-voce* evidence and will be subject to cross examination. These witnesses must be called immediately following the completion of the Expert's evidence. If staff intend to have any of the witnesses appear by videoconference, a motion should be brought within twelve (12) weeks of the date this Variance Order issues.

In addition, as has already been stated in the Decision, it is incumbent upon Staff to ensure that it calls all evidence necessary to meet the criteria of its case. Staff will not be permitted to rely upon any facts in the settlement agreement dated November 15, 2019 that has been entered as Exhibit #3 to these proceedings. The facts set out in that settlement agreement are not proven facts. To the extent that any of the facts in that settlement agreement are necessary to meet the case in this hearing, Staff counsel must lead evidence to prove such facts, and that evidence will be subject to cross examination by counsel for the MREA. Further, if Staff counsel has not made the appropriate disclosure on this additional evidence to counsel for the MREA, as required by the provisions of the Commission's Pre-Hearing Procedures Policy, such disclosure should be made forthwith.

Finally, the Hearing Panel notes that this matter, while not complicated or complex, is challenging given the number of documents and records and the number of Possible Complainants, many of which are not located in the province. The Hearing Panel further acknowledges the statements made that the Commission has not had experience dealing with a case of this magnitude previously. However, the Hearing Panel must deal with the case before it based on the law and case precedent. Once the Commission determines to proceed with an administrative hearing, it must adhere to the evidentiary requirements of such hearing.

"L.A. Vincent"

L.A. Vincent
Hearing Chair

"D. A. Huberdeau-Reid"

D. A. Huberdeau-Reid
Member