Citation: Halcyon Point Development ULC (Re),
2024 BCSRE 49
Date: 2024-07-22
File # INV18.019.43064

IN THE MATTER OF THE *REAL ESTATE DEVELOPMENT MARKETING ACT*
SBC 2004, c 41 as amended

AND

IN THE MATTER OF

HALCYON POINT DEVELOPMENT ULC

AND

DALE TORTORELLI

DECISION ON SANCTIONS

[This Decision has been redacted before publication.]

Date of Hearing:	Written Submissions
Counsel for BCFSA:	Menka Sull and Jon Peters
Counsel for the Respondents:	Jesse Gelber
Hearing Officer:	Andrew Pendray

Introduction

1. In an April 16, 2024 decision, *Halcyon Point Development ULC (Re)*, 2024 BCSRE 24 (the "liability decision"), I determined that the respondents, Halcyon Point Development ULC ("Halcyon") and Dale Tortorelli, had breached sections 14(1) and 18(1) of the *Real Estate Development Marketing Act* ("REDMA") when they marketed a development property without preparing a disclosure statement and received a deposit from a purchaser in relation to a development unit without placing that deposit in a trust account.

2. This decision relates to the sanctions and orders to be issued in respect of those findings pursuant to section 30 of REDMA. The hearing of the sanctions portion of this matter proceeded by way of written submissions.

3. BCFSA takes the position that Halcyon should be ordered to pay an administrative penalty in the amount of $30,000; and that Mr. Tortorelli should be ordered to pay an administrative penalty in the amount of $15,000.

4. BCFSA further seeks an order that the respondents are jointly and severally liable to pay enforcement expenses in the amount of $87,991.63, in accordance with section 31 of REDMA.

5. The respondents submit that Halcyon should be ordered to pay an administrative penalty of $3,000; and enforcement expenses of $1,500.

Issues

6. The issue is the appropriate orders to be issued as provided for by section 30 of REDMA. This includes the following considerations:

   - Should an administrative penalty be imposed on the respondents pursuant to section 30(1)(d) of REDMA?

   - Should the respondents be ordered to pay enforcement expenses pursuant to section 30(1)(c) of REDMA?

Jurisdiction and Procedure

7. Pursuant to section 44 of REDMA, the Superintendent of Real Estate (the “Superintendent”) may delegate any of its powers. The Chief Hearing Officer and Hearing Officers of the Hearings Department of BCFSA have been delegated the statutory powers and duties of the Superintendent with respect to sections 29 through 32 of REDMA.

Background and Evidence

8. The background to this matter is set out in the liability decision. I will not reproduce the entirety of that background and evidence here. The following is intended to provide context for my reasons.

General Summary

9. This matter came to the attention of the former Office of the Superintendent of Real Estate (“OSRE”) in July 2017. In general terms, OSRE was made aware at that time of a dispute regarding the purchase of a portion of a property in the Arrow Lakes area of British Columbia.

10. The property in question, which is referred to as “the Development Property” in the Notice of Hearing, is legally described as [Property 1] (the “property”).

11. The owner of the property was Halcyon. Dale Tortorelli was a director of Halcyon.

12. The dispute that was brought to OSRE’s attention was between the intended purchasers of a portion of the property, [Individual 1] and [Individual 2] (collectively the “[Purchasers]”), and the respondents, Halcyon and its director Mr. Tortorelli.

13. After discussions between the [Purchasers] and Mr. Tortorelli in the fall of 2016, construction work started on the portion of the property the [Purchasers] were seeking to purchase. In general terms, the ultimate plan was to build a house on the property for [Individual 1]. The parties’ initial plan was to place a trailer on the property in which [Individual 1] would live, with a subsequent plan to build a house on another location of the portion of the property the [Purchasers] were seeking to purchase. Work on the installation of electrical and water services also began around that time.

14. The [Purchasers] and the respondents had differing views as to the nature of the intended transaction relating to the property. Their views differed on whether the portion of the property the [Purchasers] were seeking to purchase was being purchased in fee simple or as a shared interest, as well as what the price for the purchase of the portion of the property was.

15. In the liability decision I determined, at paragraph 135, that the nature of the intended transaction between the parties was in fact that the [Purchasers] would be purchasing, from Halcyon, a 1.3 acre portion of the property for the price of $150,000.

16. I further determined that the respondents had marketed the property by offering to sell a 1.3 acre shared interest in the property to the [Purchasers], and that in doing so the respondents had marketed a development unit to the [Purchasers], without having first prepared or filed a disclosure statement, in breach of section 14 of REDMA.

17. I also found that the [Purchasers] had provided the respondents with monies that were intended to be deposits for the purchase of the shared interest in land, and that the respondents had failed to place those deposit funds in a trust account contrary to section 18 of REDMA. Specifically, I concluded that the [Purchasers] provided Mr. Tortorelli with a $5,000 deposit towards the purchase of that shared interest in the fall of 2016, with a further deposit of $75,000 provided on June 1, 2017.

18. My findings were set out in full at paragraph 173 of the liability decision:

> 164. I find that the respondents, Halcyon Point Development ULC and Dale Tortorelli:
>
> - Breached section 14(1) of REDMA when they marketed a development unit in a development property legally described as [Property 1] without preparing a disclosure statement; and
>
> - Breached section 18(1) of REDMA when they received a deposit from a purchaser in relation to a development unit in the development property legally described as [Property 1] without placing that deposit in the trust account of a brokerage, lawyer, notary public or trustee.

19. The construction on the property commenced in 2016, and initially involved the installation of a road, services including water, electricity, and septic, and the creation of building pads. Eventually a home, that was intended for [Individual 1]'s residence began to be constructed. The [Purchasers]' deposit money paid for some of that construction. Unfortunately, by the time the home on the property was complete, [Individual 1] no longer wished to complete the transaction for the portion of the property.

20. The [Purchasers] eventually brought a claim against the respondents in relation to the property in the Supreme Court of British Columbia, with a consent order entered into by the parties on April 18, 2023. That consent order provided the [Purchasers] judgment against the respondents in the amount of $265,000, and the [Purchasers] having no further interest in the property.

Applicable Law and Legal Principles

21. Section 30(1) of REDMA[1] provides that after a hearing, if the Superintendent determines that a developer is, or has been, non-compliant with REDMA, the Superintendent may:

> …
>
> (a) order the developer to pay amounts in accordance with section 31 *[recovery of enforcement expenses]*;
>
> (b) order the developer to pay an administrative penalty in an amount of
>
> (i) not more than $50,000, in the case of a corporation, or

[1] The quantum of penalties under section 30(1)(d) of REDMA was amended effective December 31, 2018. Those amendments do not apply to the circumstances of this case, which took place prior to that date.

(ii) not more than $25,000, in the case of an individual.

22. Section 30(2) provides that if the Superintendent intends to make an order under either of section 30(1)(c) or 30(1)(d), the Superintendent may make that order against:

    (a) the developer,

    (b) a person who was an officer, director, controlling shareholder or partner of the developer at the time of non-compliance, if that person authorized, permitted or acquiesced in the non-compliance, or

    (c) both the developer and a person described in paragraph (b).

23. The parties have referred to a number of decisions which discuss the factors and principles which ought to be applied in considering appropriate sanctions to be imposed on a party who has been non-compliant with their governing statute: *Jaswal v. Medical Board (Nfld.)*, 1996 CanLII 11630 (NL SC); *Pegasus Pharmaceuticals,* 2022 BCSECCOM 145**;** *Wong v. Real Estate Council of BC*, [2003] B.C.C.O. No. 3 (Commercial Appeals Commission) [July 25, 2003]; and *Siemens (Re)* 2020 CanLII 63581.

24. I consider the following to summarize the general purposes which sanctions may serve, and which ought to be considered in applying a sanction in any individual case:

- denouncing misconduct, and the harms caused by misconduct;
- preventing future misconduct by rehabilitating specific respondents through corrective measures;
- preventing and discouraging future misconduct by specific respondents through penalizing measures (i.e. specific deterrence);
- preventing and discouraging future misconduct by others (i.e. general deterrence);
- educating registrants, other professionals, and the public about rules and standards; and
- maintaining public confidence in the industry.

25. Administrative tribunals generally consider a variety of mitigating and aggravating factors in determining sanctions. In *Law Society of British Columbia v. Dent*, 2016 LSBC 5, the panel summarized what it considered to be the four general factors, to be considered in determining appropriate disciplinary action:

    (a) **Nature, gravity and consequences of conduct**

    [20] This would cover the nature of the professional misconduct. Was it severe? Here are some of the aspects of severity: For how long and how many times did the misconduct occur? How did the conduct affect the victim? Did the lawyer obtain any financial gain from the misconduct? What were the consequences for the lawyer? Were there civil or criminal proceedings resulting from the conduct?

    (b) Character and professional conduct record of the respondent

    [21] What is the age and experience of the respondent? What is the reputation of the respondent in the community in general and among his fellow lawyers? What is contained in the professional conduct record?

    (c) Acknowledgement of the misconduct and remedial action

> [22] Does the respondent admit his or her misconduct? What steps, if any, has the respondent taken to prevent a reoccurrence? Did the respondent take any remedial action to correct the specific misconduct? Generally, can the respondent be rehabilitated? Are there other mitigating circumstances, such as mental health or addiction, and are they being dealt with by the respondent?
>
> **(d) Public confidence in the legal profession including public confidence in the disciplinary process**
>
> [23] Is there sufficient specific or general deterrent value in the proposed disciplinary action? Generally, will the public have confidence that the proposed disciplinary action is sufficient to maintain the integrity of the legal profession? Specifically, will the public have confidence in the proposed disciplinary action compared to similar cases?

26. While the factors set out above are not binding on me, I find them to be of use in considering the appropriate penalty to be issued.

Discussion

Delay

27. In the liability decision, I determined that there had not been a delay in this proceeding such that the fairness of the hearing had been compromised.

28. The respondents now submit that there has been an inordinate delay in the proceeding of this case such that it constitutes an abuse of process for which a remedy is required.

29. In *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29¸ the Supreme Court of Canada noted that even in cases where there is no prejudice to hearing fairness, an abuse of process may occur if significant prejudice has come about due to inordinate delay:

> [43] *Blencoe* sets out a three-step test to determine whether delay that does not affect hearing fairness nonetheless amounts to an abuse of process. First, the delay must be inordinate. Second, the delay must have directly caused significant prejudice. When these two requirements are met, courts or tribunals will proceed to a final assessment of whether the delay amounts to an abuse of process. Delay will amount to an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute: *Behn*, at paras. 40-41.
>
> [44] The minority reasons in *Blencoe* concluded that there was an abuse of process, although the appropriate remedy was not a stay but rather an order for an expedited hearing and costs. In my view, the two sets of reasons in *Blencoe* can be read as complementing each other and expressing a coherent set of principles. The majority reasons set a higher threshold only for an abuse of process requiring a stay, and accepted that lesser remedies continue to be available where a stay is not warranted. With respect to when a stay of proceedings is warranted, the minority reasons recognized that a threshold of “shocking abuse” is necessary to justify a stay of proceedings (para. 155). Moreover, the minority reasons set a lower threshold for an abuse of process which might call for a lesser remedy, such as an order for an expedited hearing or costs.

30. Whether that delay was inordinate would generally require a consideration of the nature and purpose of the proceedings, the length and causes of the delay, and the complexity of the facts and issues in the case.

31. In this case, the respondents submit that their interests were engaged in 2017 when they were contacted by OSRE, and that there was no legitimate excuse for the delay of five years leading up to the issuing of the first Notice of Hearing in August 2022.

32. BCFSA has set out a helpful timeline of this matter in its submissions.

33. The matter was initiated, from the perspective of the regulator, when it received a complaint in July 2017. For nearly the next year, until June 2018, when the respondents entered into an undertaking to cease marketing, the regulator was in regular contact with the respondents, seeking to have the respondents comply with requests for a disclosure statement and/or an undertaking.

34. While the undertaking to cease marketing was signed by the respondents in June 2018, it was not until April 2021, nearly three years later, that OSRE completed its report. A supplemental investigation report was issued on June 21, 2022, and, on August 3, 2022, the original Notice of Hearing was issued.

35. The hearing of this matter was originally scheduled to proceed in November 2022, however those dates were adjourned at the respondents' request. The respondents requested, on April 25, 2023, a further adjournment of hearing dates scheduled in May 2023, and again requested a further adjournment of hearing dates in November 2023.

36. Based on the above, I do not consider there to have been a five year "delay" in this case. There was however, a significant period of time between June 2018 and the issuing of the Notice of Hearing in August 2022. BCFSA has provided little in the way of explanation, other than to say that there was to be some delay expected during COVID-19.

37. As will be seen below, I have concluded that the evidence does not demonstrate that the respondents experienced a significant prejudice in this case, and as a result do not consider that I need determine whether there was in fact an inordinate delay.

38. I note that even if I had accepted that there had been a five year delay in bringing the matter forward such that the delay ought to be considered inordinate, I do not agree with the respondents' submission that such a delay of 5 years may satisfy the *Abrametz* test with no need for further evidence of prejudice or unfairness: citing *Commission des droits de la personne et des droits de la jeunesse (Miller et autres) v. Ville de Montréal (Service de police de la Ville de Montréal)* 2019 QCTDP 31 (CanLII)

39. The court in *Abrametz*, which was decided subsequent the *Commission des droits* decision, specifically noted at paragraph 67 that delay alone is not sufficient to lead to an abuse of process. Rather, the court held that it is only where there is detriment to an individual that a court or tribunal will conclude that there has been an abuse of process. The court in *Abrametz* specifically held that the doctrine of abuse of process as it relates to administrative delay requires proof of significant prejudice. The court went on to indicate that:

> [69] Prejudice is a question of fact. Examples include significant psychological harm, stigma attached to the individual's reputation, disruption to family life, loss of work or business opportunities, as well as extended and intrusive media attention, especially given technological developments, the speed at which information can travel today and how easy it is to access.

> [70] In *Misra*, a doctor was suspended from practice for almost six years, while the College of Physicians and Surgeons chose to wait for years for the completion of criminal proceedings against him before proceeding with the disciplinary process. The criminal proceedings were eventually abandoned. Dr. Misra's reputation had suffered; he had been unable to practice his profession; his professional prospects were diminished.
>
> [71] In *Investment Dealers Association of Canada v. MacBain*, 2007 SKCA 70, 299 Sask. R. 122, lengthy delays exacerbated the harm to the applicant's reputation by publicity from a disciplinary investigation. Profits from his business collapsed, then recovered to some degree as publicity around the initial investigation faded, only to be threatened again after the negative publicity around his business was revived years later when the notices of hearing were finally issued: paras. 40-41; see also *Financial and Consumer Services Commission v. Emond*, 2020 NBCA 42. This is the type of significant prejudice contemplated in *Blencoe*.

40. Here, Mr. Tortorelli submitted that due to the delay in the administrative proceedings, he is now impecunious. He noted further that he has separated from his wife, and as a result no longer has access to the sources of capital that could have been used to manage the liability of a penalty. He submitted that:

> Had this matter been brought to his attention in a timely way, and prior to his 2020 separation, then what was then matrimonial property could have been leveraged to resolve these matters. Presumably any resulting penalty would also have been considered family debt under section 86 of the *Family Law Act* [SBC 2011] c. 25.
>
> Furthermore, the Respondents had no knowledge of this administrative proceeding until shortly after they had settled their civil claim with the [Purchasers]. If they had known of this administrative proceeding, they would have either not settled that matter in the manner they did, or they would have held back funds in order to ensure that both matters were resolved concurrently.
>
> Instead, the delay caused them to not have knowledge of the matter until after they had paid a fulsome settlement to the [Purchasers], without any release language to protect them from the financial consequences of this unknown contingent liability.

41. While I acknowledge the respondents' submissions, I do not consider the above to consistute the type of prejudice contemplated in *Abrametz*.

42. Even if I were to consider the separation from his wife as the type of family disruption contemplated by *Abrametz*, the respondents do not offer any explanation of how or why Mr. Tortorelli's separation from his wife was related to the delay in bringing this proceeding to a hearing.

43. In his May 27, 2024 affidavit Mr. Tortorelli indicates not only that he in fact had no knowledge that there would be any regulatory proceeding against the respondents until August of 2022, but also that he separated from his wife in 2020. It is difficult to understand how Mr. Tortorelli would relate his family disruption in the form of separation in 2020 and the impact that may have had on his finances, to an administrative hearing process he claims to not have been aware of until 2022.

44. Furthermore, I do not accept Mr. Tortorelli's position that he would have settled his family dispute and civil proceeding on different terms had he known that he could be subjected to a proceeding under REDMA. There is no evidence before me of the terms and context of the settlements in either of those matters, nor do I accept that this is the type of significant prejudice contemplated by *Abrametz.* I have already rejected their submissions regarding the fairness of the hearing, and they do not assert that the outstanding proceedings caused psychological stress, health impacts, embarrassment, reputational harm, or financial losses as contemplated by *Abrametz*. I find that Mr. Tortorelli has not described any prejudice that would, in my view, satisfy the test in *Abrametz*.

45. As I have concluded that the evidence does not support a conclusion that there was significant prejudice in this case, I do not consider it necessary to consider whether there was an abuse of process, and if so what remedy, if any, may be appropriate.

46. I note that I do not wish my conclusion that it is not necessary to consider whether an abuse of process occurred in this case to be seen to be an indication that it would not have been preferable for this matter to have been brought forward for hearing in a more expeditious manner. As the court in *Abrametz* noted, the purposes of disciplinary bodies are to protect the public, regulate the profession, and preserve public confidence. Delay in bringing forward disciplinary proceedings can be harmful to both members of professional bodies, complainants, and the public in general.

Should an administrative penalty be imposed on the respondents pursuant to section 30(1)(d) of REDMA?

47. I note at the outset of my consideration of this issue, that the parties agree in their submissions that an administrative penalty is appropriate in the circumstances of this case.

48. Given the parties' submissions in that regard, I consider it to be practical to determine, prior to determining the quantum of any penalty, whether or not administrative penalties should be imposed against both Halcyon and Mr. Tortorelli individually, as provided for by section 30(2) of REDMA.

49. BCFSA takes the position that a penalty against both Halcyon and Mr. Tortorelli as the director of Halcyon is appropriate in this case due to the fact that Mr. Tortorelli negotiated the purchase agreement with the [Purchasers], and, in BCFSA's submission, Mr. Tortorelli personally benefited from depositing the [Purchasers]' monies into his various business accounts.

50. Mr. Tortorelli submits that there is no principled reason for which he would be found to have personal liability for a penalty outside of that attributed to Halcyon. Mr. Tortorelli submits that he was at all times acting as agent of the corporate property owner Halcyon, and that agents cannot generally be held liable in contract to a third party where there is a disclosed principal (Halcyon in this case): *Lang Transport Ltd. v. Plus Factor International Trucking Ltd*., 1997 CanLII 1904 (ONCA). Mr. Tortorelli further submits that the law of agency suggest that judgment should only be obtained against either the agent or the principal, but not both: *Dan Gamache Trucking Inc. v. Encore Metals Inc.*, 2008 BCSC 343

51. I do not consider the law of agency as referred to by Mr. Tortorelli to have particular application in this case, given the application of section 30(2) of REDMA. Rather, I consider the clear language of REDMA to provide that orders may be made against the developer, a director, or both.

52. There is nothing in REDMA that suggests that an order must be limited to one of a developer or a director simply based on agency.

53. I consider that Mr. Tortorelli is likely correct, to a degree, that the legislature intended to ensure that collection of an administrative penalty would still be possible from a director when a corporate developer was insolvent. However, I consider further that section 30(2) also was likely intended to provide the ability to issue administrative penalties against both a developer and a director when separate penalties were warranted for each party.

54. I am not satisfied that separate penalties are warranted for both Halcyon and Mr. Tortorelli in this case. Rather, I consider a single penalty, as against both Halcyon and Mr. Tortorelli, is appropriate. My reasons for having reached this conclusion follow.

55. It is clear that Halcyon engaged in non-compliance with REDMA by failing to file a disclosure statement and failing to deposit client funds as required. I agree that such non-compliance is worthy of penalty.

56. However, while BCFSA has submitted that Mr. Tortorelli “personally benefited from depositing the [Purchasers]’ monies into his various business accounts”, I am not satisfied that the evidence and information before me supports such a finding.

57. While I accept that Mr. Tortorelli directed payments received from the [Purchasers] towards his various companies, the evidence before me was that those monies were specifically used for the construction projects associated with the property the [Purchasers] were seeking to purchase. Further, on the evidence before me, Mr. Tortorelli was essentially providing all of those construction services at cost (certainly, the materials for which I have seen receipts appear to have no markup).

58. In sum, I consider, and Mr. Tortorelli has acknowledged, that there was benefit to Halcyon in having the [Purchasers] contribute to the cost of bringing services on to the Halcyon property. However, there is insufficient evidence before me to conclude on a balance of probabilities that Mr. Tortorelli was in fact receiving a personal benefit in performing the construction services required.

59. Having regard to that conclusion, and the fact that, as the respondents have submitted, Halcyon owns its lands “free and clear” such that there is no possibility of a hollow judgment from the corporation in this case, I find a single penalty against Halcyon and Mr. Tortorelli, as provided for by section 30(2)(c) of REDMA is appropriate in this case.

60. I turn to a consideration of the factors for determining the appropriate penalty.

<u>The Misconduct</u>

61. BCFSA takes the position that the respondents’ non-compliance in this case was more than merely a technical breach of REDMA.

62. Rather, BCFSA submits that the respondents’ non-compliance with REDMA in fact created real harm to the [Purchasers].

63. In support of its submission, BCFSA points to the fact that although the [Purchasers] invested a significant sum into the property, they were never able to obtain the interest in land that they had sought. Further, the [Purchasers] ultimately were forced to obtain compensation for their expenditures, including the deposit monies as well as the money spent on house construction, only through litigation.

64. In sum, BCFSA submits that the [Purchasers] sustained real financial harm.

65. BCFSA further submits that the severity of the respondents' conduct should be considered in light of the fact that Mr. Tortorelli knew he was unable to sell a portion of the property to the [Purchasers] as a fee simple sale from the outset of their discussions, due to the fact that the property had not been subdivided. BCFSA describes Mr. Tortorelli as having had ample time to correct the [Purchasers]' misunderstanding of the nature of the agreement they were entering into (which, it turned out, was for a shared purchase in land), but to have instead taken advantage of the asymmetry in knowledge and experience between himself and the [Purchasers] in continuing to move the project forward without explaining the precise nature of the transaction.

66. In BCFSA's submission, this failure on the respondents' part to correct the asymmetry of knowledge exacerbates the misconduct at issue, which includes the failure to provide a disclosure statement as required by REDMA. In BCFSA's submission, the provision of a disclosure statement may well have allowed the [Purchasers] to understand what they were agreeing to with respect to the portion of the property they were seeking to purchase.

67. BCFSA submits further that Mr. Tortorelli's direction of the deposit monies for the [Purchasers]' purchase of the portion of the property into his own various companies rather than placing them in trust is further serious misconduct, in that this placed the [Purchasers] in a position of being financially vulnerable to the respondents. In BCFSA's submission:

> …The financial harm was not abstract – it materialized when the [Purchasers] lost both the money they gave Mr. Tortorelli for the purchase of land, but also the money they spent to develop that land.

68. The respondents, on the other hand, take the position that the situation that unfolded between them and the [Purchasers] was essentially a situation of "no good deed goes unpunished".

69. In the respondents' submission, Mr. Tortorelli was simply attempting to assist his employee in having a good house to live in.

70. Rather than Mr. Tortorelli having a greater degree of knowledge regarding the purchase and sale of land, the respondents submit that Mr. Tortorelli's actions in fact demonstrates, at best, "an unsophisticated naivete". The respondents say that they did not obtain any financial gain from the non-compliance in this case, given that they reached a financial settlement with the [Purchasers]; that as a result of that settlement, the [Purchasers]'s did not experience any financial harm; and that the respondents' true intention were only to spread out the cost of utility installations while providing the [Purchasers] with housing at cost.

71. I consider the circumstances of this case to be rather unusual.

72. I accept, in general terms, that Mr. Tortorelli and Halcyon did not have any particular intention to cause any harm to the [Purchasers]. I consider my finding in this regard to weigh against a conclusion that the nature of the respondents' misconduct was "severe".

73. As I indicated in the liability decision, while I considered the parties to have differing views as to the nature of the agreements between them, I have no doubt that:

> [121] [Individual 1], [Individual 2], and Mr. Tortorelli all agreed that, in some fashion, the intention of the agreement between the parties was that there would be construction done on the [Purchasers'] portion, that that construction would include the provision of building pads and the installation of services including roads, water, septic, and electricity, and that the [Purchasers] would be placed on title of the property.

74. However, despite what may well have been good intentions on the part of the respondents, the fact remains that the [Purchasers] did experience harm as a result of not having received a disclosure statement.

75. Had the [Purchasers] received a disclosure statement as required prior to construction having commenced on the portion of the property they were seeking to purchase, they would have been made aware, at the outset, that there was no subdivided portion available for them to purchase in fee simple.

76. Further, I consider there to be little doubt that the respondents obtained some degree of financial gain through their misconduct (Mr. Tortorelli specifically acknowledged at the hearing of this matter that there was value to the respondents in having the services, paid for by the [Purchasers], brought onto the property).

77. The severity of the misconduct is also seen in the fact that civil proceedings were required in order for the [Purchasers] to be made whole once it became clear that the interest in the land they were to acquire was not what they were seeking.

78. Further, the respondents' failure to hold the [Purchasers]' deposits in a trust account further created harm, in that those deposit monies were not available to be refunded when it became apparent that the transaction for the portion of the property was not possible in the manner they were intending, that being an outright purchase of a portion of the property.

79. I note that if the respondents had in fact placed those deposit monies in trust, as required by section 18 of REDMA, and had wanted to use those deposit funds for their own purposes, in this case the development of services to the intended [Purchasers'] portion of the property, they still would have been able to do so provided they had entered into a deposit protection contract as required by section 19(2) of REDMA. The [Purchasers]' funds would then have been insured, such that if the [Purchasers] had intended to exercise a right of recission under section 21 of REDMA, those funds could have been paid out to them.

80. In summary, I do not consider that the respondents had malicious intent in failing to comply with REDMA, failing to provide a disclosure statement, and failing to place deposit funds in trust. As I have indicated above, I consider that the parties were all largely aligned in their goal of creating a place for [Individual 1] to live. It did not appear to me that the respondents were attempting to take advantage of the [Purchasers] in assisting in providing that place to live.

81. However, despite the good intentions, I also consider that the misconduct is appropriately considered to be serious. There was some initial financial advantage gained by the respondents in the bringing of services onto the property. The [Purchasers] were affected in that their plan to have ownership of a property was thrown into disarray due to the lack of disclosure they were provided. Litigation ensued.

82. Simply put, if the respondents had followed the law as set out in REDMA, this entire situation, including the litigation that occurred between the parties, would likely have been avoided.

83. In failing to do so, regardless of the nature of their intentions, I consider the respondents to have engaged in serious misconduct.

<u>Other Relevant Factors</u>

<u>Professional conduct record of the respondents</u>

84. Mr. Tortorelli described, at the hearing of this matter, as having been someone who had “built a lot of subdivisions”. He described himself as someone who had been in the business of “dirt, rock, aggregate and machinery” for over 40 years. Mr. Tortorelli stated that he had done a significant amount of subdivision and civil construction, generally through the use of heavy equipment to contour land into the shape that is required and desired.

85. Mr. Tortorelli indicated that he was not certain as to whether any of the previous properties he had worked on had been owned by a company he was a director of.

86. In his affidavit provided on the sanctions portion of this matter Mr. Tortorelli described himself as an inexperienced developer, having not previously done any development business prior to the purchase of the Halcyon properties.

87. Mr. Tortorelli noted that one of the Halcyon properties had been surveyed in or around 2010, and that a disclosure statement had been filed at that time, but he indicated that he had no involvement in that process as it had been handled by the companies’ agents.

88. There is no indication on the evidence before me that the respondents had any prior history of non-compliance with REDMA.

89. I consider the fact that the respondents had no prior history of non-compliance with REDMA to be a neutral factor. I note, in reaching this conclusion, that I consider my comments in *Rohani (Re),* 2024 BCSRE 3 to have equal application in considering history of non-compliance under REDMA:

> 55. Individuals who participate in regulated industries are subject to the laws, rules, and regulations associated with those industries. They are expected to comply with the laws, rules, and regulations that are applicable to them. Compliance with the regulatory scheme is, in effect, part of the individual licensee’s professional responsibility. It does not strike me as logical that the fact that an individual has not previously breached the applicable regulatory law or rules with which they are expected to comply would suggest that that same individual, upon having been found to engaged in such a breach of professional responsibility, would automatically be entitled to a reduction from whatever penalty would normally be found to be appropriate for the misconduct in question.

Acknowledgement of misconduct and remedial action

90. Frankly, the evidence before me largely indicated that the respondents were simply not aware that REDMA had any application to the agreement between them and the [Purchasers].

91. I note that essentially as soon as he was contacted by OSRE in late July 2017 regarding the need for a disclosure statement prior to marketing the property, Mr. Tortorelli replied and indicated that he would have the disclosure statement completed “as soon as possible” and that “no further marketing of that property will occur without all proper documentation.” Mr. Tortorelli proceeded to hire a lawyer to address the issues raised.

92. Further, although the [Purchasers] and the respondents had concluded at some point in the summer or fall of 2017 that the property would not be transferred to the [Purchasers], and the property was not being considered for sale to any other party, the respondents nevertheless provided a completed disclosure statement to OSRE on May 4, 2018 (although with some deficiencies), and eventually an undertaking to cease marketing on June 20, 2018.

93. I consider, largely, that the respondents did not intend to engage in non-compliance, and that they took appropriate steps to address that non-compliance in the months following (although not as quickly as could have been done).

94. I consider this factor to be somewhat mitigating.

Previous Sanctions Decisions and Consent Orders.

95. As I have indicated above, in determining the appropriate sanction, consideration should be given to disciplinary action that has been issued in similar cases. While prior disciplinary decisions and consent orders are not binding on me, they can be of assistance in determining a penalty that the public will have confidence in.

96. I note, in reviewing consent orders, that I consider that caution must be taken when comparing an agreed upon penalty from a consent order to a penalty imposed by a discipline hearing, given that there may be a myriad of reasons for a respondent to agree to a consent order which are not apparent from a review of that consent order.

97. I turn to a review of the consent orders referenced by BCFSA:

- In the *Matter of the Real Estate Development Marketing Act and Balcom Financial Corporation et al* (July 29, 2008): One of the corporate respondents (Madden) agreed to a $25,000 penalty; and a $12,500 penalty for two of the individual respondents (the Balcoms, who were directors of Madden); as well as $6,500 in enforcement costs.

  The conduct at issue involved advertisement of the development, a nine-unit condominium, and of a development permit to construct an additional two buildings containing eight and eleven units, respectively. The developers failed to file disclosure statements prior to sales of the nine-unit condominium and prior to marketing of any of the buildings. Further, the respondents had received deposit monies from at least nine people without depositing those monies in trust.

- In the *Matter of the Real Estate Development Marketing Act and Holburn Developments (2812 Main) Ltd. et al* (March 30, 2011), the developer agreed to pay a $10,000 penalty and $5,000 in investigation costs for the developer's failure to file a satisfactory amended disclosure statement and, an inadvertent violation of an undertaking to cease marketing when a new director who was not aware of the undertaking sold a unit in the development.

- In the *Matter of the Real Estate Development Marketing Act and J. Gordon Enterprises Ltd. et al* (May 10, 2012), the developer and its director agreed to a $10,500 penalty and $2,138 in enforcement costs. The developer and director admitted to the sale of a number of strata lots prior to providing a filed disclosure statement based on the incorrect assumption that an exemption applied. Some of the lots were sold even after the regulator had advised the respondents that a disclosure statement was likely required. It was agreed that the developer was under an honest but mistaken belief.

- In the *Matter of the Real Estate Development Marketing Act and Soaring Peaks Developments Ltd. and Philip Leseur* (October 21, 2008) the developer agreed to pay a penalty of $30,000 and its director agreed to pay a penalty of $10,000 in addition to investigation costs of $1,147.50 for actively marketing a development after undertaking to cease marketing and without filing an amended disclosure statement. The director specifically wrote the regulator and indicating that all marketing had ceased, however units were actively being marketed, and continued to be marketed, for a period of nearly six months.

- In the *Matter of the Real Estate Development Marketing Act and The Springs RV Resort at Harrison Inc. et al* (January 13, 2009), the developer entered into a consent order in which it and its directors agreed to a $15,000 penalty and investigation costs of $1,843. The developer had failed to get certain approvals before commencing early marketing, and failed to amend a disclosure statement to disclose the existence of a stop work order.

Decision on Sanction

98. Penalties in the regulatory context must not be imposed purely for the purpose of being retributive or denunciatory. Rather, penalties may be imposed with the intention to encourage compliance with regulations in the future, with a view to specific or general deterrence, and with the intention of protecting the public: See *Thow v. BC (Securities Commission)*, 2009 BCCA 46, at para. 38.

99. As the court in *Thow* noted, however, the fact that a penalty imposes a burden, even a very heavy burden, on an offender, does not mean that penalty is necessarily punitive in nature, as long as the penalty is designed to encourage compliance with regulations in the future.

100. In my view, an appropriate penalty in this case is $20,000, to be paid jointly and severally, by Halcyon and Mr. Tortorelli. In reaching that conclusion I have considered the need for specific and general deterrence, as well as whether the public would have confidence in the proposed disciplinary action.

101. BCFSA submits that the *Balcom* case is most similar to the instant case in that there was not only a failure to provide a disclosure statement but also a failure to place deposit monies in trust.

102. In my view the respondents' actions in the instant case were closer towards being of the inadvertent nature than the facts described in the *Balcom* consent order.

103. In *Balcom* the director acknowledged that he had at all times been aware that a disclosure statement needed to be filed, and that he had specifically continued to market the development knowing the disclosure requirements had not been met.

104. In the case before me, the respondents appear to have been largely unaware that they were acting as a developer, or that they were "marketing" the portion of the property to the [Purchasers].

105. However, despite what may have been the inadvertent marketing of the property, I consider that a penalty greater than those agreed to in *Holburn* and *Gordon* is appropriate, given that in this case the respondents in fact collected significant sums of deposit monies and failed to deposit those in a trust account. This action led to harm to the [Purchasers] that was only rectified through the civil litigation process. While the respondents submit that there is no chance of this type of thing happening to them again, I note that the respondents continue to own property that could potentially be developed. While I accept that the respondents are sincere in their submission, I am of the view that some degree of specific deterrence is required.

106. Further, I consider that a penalty that achieves general deterrence is also of importance in this case in order to ensure the protection of the public. Simply put, I consider it to be necessary to signal to the industry that the failure to place purchaser deposits in a trust account as required by section 18 of REDMA will be met with a penalty of significance.

107. I do not consider that a nominal penalty such as that suggested by the respondents would ensure that the public had confidence that the integrity of the REDMA system was being upheld.

108. Again, this is a case in which the developer collected at least $100,000 in funds from a purchaser, did not put those funds in trust, and in which the purchase ultimately had to litigate in order to get their funds returned. While it may be that the respondents' initial intentions were to help out the purchaser to a certain degree, the reality is that as a result of failing to comply with the law, actual harm occurred (although that harm was ultimately rectified through litigation). In my view, the public's expectation would be that a developer would face significant consequences from the regulator for situations such as that which occurred in this case, particularly where they are forced to resort to litigation to recover their funds. I do not consider they would see such public protection and enforcement activities as being effectively carried out through the imposition of a $3,000.00 penalty.

Should the respondents be ordered to pay enforcement expenses pursuant to section 30(1)(c) of REDMA?

109. BCFSA claims enforcement expenses in the amount of $87,991.63.

110. Included in that amount are investigation costs of $3,070; administrative expenses in the amount of $8,000 for four days of hearing; legal services in the amount of $72,065.26; and a number of other disbursements. BCFSA takes the position that it is entitled to its costs of investigating this matter and resolving it by way of a hearing, as provided for by REDMA.

111. The respondents submit that enforcement expenses in the amount of $1,500 ought to be ordered.

112. In making that submission, the respondents say that if this matter proceeded in the Supreme Court of BC and was subject to the tariff as set out in the Supreme Court Civil Rules, costs would not likely be in excess of $9,500. The respondents further say that the approximately 200 hours of legal services was excessive.

113. Section 31(1) of REDMA sets out that the Superintendent may, by order under section 30(1)(c), require a person described under section 30(2) to pay the expenses, or part of the expenses, of either or both of an investigation and/or hearing. Section 31(2) further provides that:

> (2) Expenses assessed under subsection (1)
>
> (a) must be for the matters, and must not exceed the amounts, set out in the regulations, and
>
> (b) may include remuneration expenses for employees, officers or agents of the Authority engaged in the investigation or hearing.

114. Section 12 of the *Real Estate Development Marketing Regulation* provided that:

> 12 (1) The expenses that the superintendent may require a developer or former developer to pay under section 31 [*recovery of enforcement expenses*] or 36 [*undertakings*] of the Act are as follows:
>
> (a) investigation expenses, to a maximum of $100 for each hour for each investigator;
>
> (b) for each day or partial day of a hearing, administrative expenses of $2000;
>
> (c) for reasonably necessary legal services,

(i) $150 for each hour for a lawyer regularly employed by, or on behalf of, the government, and

(ii) in any other case, up to $400 for each hour;

(d) disbursements properly incurred in the provision of legal services to the superintendent;

(e) for each day or partial day that a witness, other than an expert witness, attends at a hearing at the request of the superintendent, $50;

(f) for an expert witness who attends at a hearing at the request of the superintendent, up to $400 for each hour;

(g) reasonable travel and living expenses for a witness or expert witness who attends at a hearing at the request of the superintendent;

(h) other disbursements, reasonably incurred, arising out of a hearing or an investigation leading up to a hearing.

(2) The superintendent must not make an order respecting expenses under subsection (1) for an amount greater than the expenses actually incurred by the superintendent.

115. Given the discretionary nature of section 31, I consider the comments from a panel of the former Real Estate Council of BC, in *Siemens (Re),* 2020 CanLII 63581, to provide a helpful basis upon which to consider the amount of enforcement expenses that should be ordered:

> 62. Enforcement expenses are a matter of discretion. A discipline committee will ordinarily order expenses against a licensee who has engaged in professional misconduct or conduct unbecoming a licensee. Orders for enforcement expenses serve to shift the expense of disciplinary proceedings from all licensees to wrongdoing licensees. They also serve to encourage consent agreements, deter frivolous defenses, and discourage steps that prolong investigations or hearings.
>
> 63. … The practice of discipline committees has also been to assess reasonableness of enforcement expenses by examining the total amounts in the context of the duration, nature, and complexity of the hearing and its issues. While a discipline committee may reduce any award of enforcement expenses to account for special circumstances, such as where the Council fails to prove one or more allegations corresponding to a significant and distinct part of a liability hearing, no such special circumstances arise in this case.

116. The respondents argue that they should not be responsible to pay for the legal services claimed on the basis that this case related to a little known and seldom prosecuted offence that the respondents took steps to address as soon as being made aware of the issue.

117. While I appreciate, as I have indicated above, that Mr. Tortorelli, on behalf of the respondents did contact a lawyer and seek assistance shortly after being made aware of the issue, it is also necessary to note that Mr. Tortorelli did not file a disclosure statement for a period of nearly 10 months following being contacted by the regulator. Further, the evidence before me is that the civil matter in this case did not resolve until a consent order was reached in April 2023. Certainly, I consider that the regulator had an ongoing interest in ensuring compliance in a situation in which

a purchaser ended up having to go to court to obtain recourse for a developer's misunderstanding of the application of REDMA.

118. In sum, I do not consider this was simply a situation in which the regulator ought to have been able to deal with in a matter of hours, as the respondents appear to suggest.

119. I also do not consider it is appropriate to compare consent order enforcement expenses to those of a case that went to a multi-day hearing. In addition to the general concern that there may be a variety of reasons for which parties to a consent order have agreed to certain orders, the fact is that multiple days of hearing, at which legal counsel is attending, is likely to lead to a significant increase in the enforcement expenses claimed.

120. Contrary to the submissions of the respondents, I consider BCFSA has provided a detailed accounting of the time legal counsel has spent on this case, as attached to the June 4, 2024 affidavit from [Individual 3], legal assistant. I do not consider any of the entries to be particularly out of keeping with the time that would generally be required of a lawyer preparing for a hearing, including preparation for an application for a stay on the basis of an abuse of process.

121. There is no doubt that the enforcement expenses sought in this case far outstrip the amount of the administrative penalty I have found to be appropriate in this case. I note, as the panel did in *Siemens,* that unlike monetary sanctions which are based in part on the nature of the respondent's misconduct, enforcement expenses are, pursuant to section 31, based on the resources reasonably expended to address non-compliance, including the expense of an investigation and a hearing. As a result, it is not unusual to see cases in which the enforcement expenses ordered are greater than the monetary penalty.[2] As the committee stated in *Yang (Re)*, 2021 CanLII 86353 (BCREC):

> 44. …where the duration of a hearing was not excessive, then subject to the discretion of the Committee to reduce enforcement expenses due to divided success, the amount of enforcement expenses will not be unreasonable due simply to the expenses exceeding some multiple of an ultimate fine amount.

122. Having noted the above, I consider that reduction of the expenses claimed by BCFSA is warranted to some degree. By far the largest portion of the enforcement expenses sought in this case relates to reasonably necessary legal services. While I agree with the respondents that this was not the most document heavy case, I note that there were a number of adjournments and other applications in this case, including a last minute adjournment application brought prior to the commencement of the scheduled hearing in November 2023 which would have resulted in preparation costs thrown away, as well as the potential application for a stay based on delay, all of which would have increased the amount of legal services required.

123. On the other hand, while I can appreciate that BCFSA is entitled to make the decision to have two lawyers prepare and present their case, I do not consider that this case is necessarily one that required two lawyers to attend at the hearing.

124. Having regard to the above, and the discretionary nature of enforcement expenses, I would apply a general reduction of 10% to reflect that it may not have been reasonable to have two lawyers in attendance for the entirety of the hearing proceedings. I am satisfied that total enforcement expenses of $79,192.47 appropriately reflects the duration, nature and complexity of the hearing process in this case.

---

[2] See for example *Bratch (Re)*, 2021 CanLII 92519 (BC REC); *Wang (Re)*, 2024 BCSRE 1 (CanLII); *Chonn (Re)*, 2021 CanLII 89769 (BC REC); and *Siemens*.

Conclusion

125. Having found in *Halcyon Point Development ULC (Re)*, 2024 BCSRE 24 that the respondents, Halcyon Point Development ULC and Dale Tortorelli:

- Breached section 14(1) of REDMA when they marketed a development unit in a development property legally described as [Property 1] without preparing a disclosure statement; and

- Breached section 18(1) of REDMA when they received a deposit from a purchaser in relation to a development unit in the development property legally described as [Property 1] without placing that deposit in the trust account of a brokerage, lawyer, notary public or trustee.

I would now make the following orders:

- Pursuant to section 30(1)(d) and 30(2) of REDMA, I order that Halcyon Point Development ULC and Dale Tortorelli, jointly and severally, pay an administrative penalty in the amount of $20,000, within 120 days of the date of this order; and

- Pursuant to section 30(1)(c) and section 31 of REDMA, I order that Halcyon Point Development ULC and Dale Tortorelli, jointly and severally, pay enforcement expenses in the amount of $79,192.47, within 120 days of the date of this order.

126. Pursuant to section 37(1) of REDMA, the respondents have the right to appeal the above orders to the Financial Services Tribunal within 30 days from the date of this decision: *Financial Institutions Act,* section 242.1(7)(d), and *Administrative Tribunals Act,* section 24(1).

Issued at Kelowna British Columbia, this 22nd day of July, 2024

"Original signed by Andrew Pendray"

____
Andrew Pendray
Chief Hearing Officer