

IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
S.B.C. 2004, c. 42 as amended

AND

KEVINDEEP SINGH BRATCH (148527)
and BRATCH REALTY LTD. (X030195)

REASONS FOR DECISION REGARDING SANCTION

Date of Hearing:	July 23, 2021 (the Sanction Hearing was conducted in writing only)
Discipline Hearing Committee:	Y. Amlani, Chair R. Gialloreto S.Sidhu
Counsel for RECBC:	M. Kalan (RECBC) C. Davies (RECBC)
Counsel for Respondent:	Kevindeep Singh Bratch, appearing on his own behalf
Court Reporter:	Not applicable.

A. INTRODUCTION

1. This Discipline Committee (the “Committee”) reconvened to hear submissions on sanctions and enforcement expenses (the “Sanction Hearing”), based on its determining earlier that the Respondents, Mr. Bratch and Bratch Realty Ltd. (the “Brokerage”), committed professional misconduct and conduct unbecoming a licensee, within the meaning of section 35(1) and (2) of the RESA, and as set out in its first decision about Mr. Bratch (the “Liability Decision”) and in its supplemental decision about the Brokerage (the “Supplemental Decision”).
2. The Committee must make an order under RESA section 43(2) to impose one or more discipline penalties. Such discipline penalties may include an order requiring payment under RESA sections 44(1) and (2) concerning expenses in relation to the investigation and the discipline hearing.
3. The Committee held the Sanction Hearing in writing, and the parties provided their written submissions as follows:

- a. on June 25, 2021, the Council provided submissions on sanction and expenses; and
- b. on July 9, 2021, Mr. Bratch provided response submissions on behalf of himself and the Brokerage.

B. EVIDENCE

4. The Committee received evidence, made findings of fact, and made findings of professional misconduct and conduct unbecoming a licensee during the Liability Hearing. The Council relied on those findings for purposes of sanction. The Council also provided evidence with respect to Enforcement Expenses of \$63,763.66.

5. Although Mr. Bratch did not provide additional testimony or evidence in affidavit form with his submissions on sanction, he made some factual assertions in his submission. He also referred to the fact of his licence having been suspended since October 30, 2017.

C. PRIOR FINDINGS OF MISCONDUCT

6. In the Liability Decision, the Committee determined professional misconduct and concurrent conduct unbecoming, concerning Mr. Bratch and the Brokerage, as follows:

- a. In relation to the Rxxxxx Property,
 - i. professional misconduct by Mr. Bratch due to his contravening his duty to act honestly and with reasonable care and skill, by failing to clarify his role as adverse to the owners, and by failing to recommend that they obtain independent legal advice; and
 - ii. professional misconduct by the Brokerage pursuant to s. 35(3) of the Act;
- b. In relation to the Sxxxxxxxxxxx Property, professional misconduct by Mr. Bratch due to his contravening his duty to act honestly and with reasonable care and skill, by failing to clarify his role, and by failing to recommend that they obtain independent legal advice;
- c. In relation to the Lxxxxxx Property,
 - i. professional misconduct by Mr. Bratch due to his contravening his duty to act honestly and with reasonable care and skill, by failing to clarify his role, and by failing to recommend that they obtain independent legal advice; and
 - ii. conduct unbecoming a licensee by Mr. Bratch, due to his entering a “rent-to-own” arrangement with the owners without first clarifying his role and expressly recommending independent legal advice;
 - iii. professional misconduct and conduct unbecoming a licensee by the Brokerage, pursuant to s. 35(3) of the Act;

- d. professional misconduct by Mr. Bratch due to his contravening various Rules by
 - i. failing to disclose, with respect to the Rxxxxx Property, the nature of his relationship with a corporate buyer on a Disclosure of Interest in Trade form;
 - ii. failing to provide, with respect to the Sxxxxxxxxxxx Property, a Disclosure of Interest in Trade form;
 - iii. failing, with respect to the Lxxxxxx Property, to list his wife as an associate on the Disclosure of Interest in Trade form; and
- e. professional misconduct by Mr. Bratch and by the Brokerage, due to their contravening various Rules by making, or allowing to be made, a false or misleading statement in a Brokerage Activity Report dated March 23, 2017.

D. STATUTORY AUTHORITY

7. RESA authorizes and mandates discipline penalties under section 43(1)(a), (2) and (2.1):

Discipline orders

43 (1) After a discipline hearing, the discipline committee must

- (a) act under this section if it determines that the licensee has committed professional misconduct or conduct unbecoming a licensee, or
- (b) in any other case, dismiss the matter.

(2) If subsection (1) (a) applies, the discipline committee must, by order, do one or more of the following:

- (a) reprimand the licensee;
- (b) suspend the licensee's licence for the period of time the committee considers appropriate or until specified conditions are fulfilled;
- (c) cancel the licensee's licence;
- (d) impose restrictions or conditions on the licensee's licence or vary any restrictions or conditions applicable to the licence;
- (e) require the licensee to cease or to carry out any specified activity related to the licensee's real estate business;
- (f) require the licensee to enrol in and complete a course of studies or training specified in the order;

(g) prohibit the licensee from applying for a licence for a specified period of time or until specified conditions are fulfilled;

(h) require the licensee to pay amounts in accordance with section 44 (1) and (2) [*recovery of enforcement expenses*];

(i) require the licensee to pay a discipline penalty in an amount of

(i) not more than \$500 000, in the case of a brokerage or former brokerage, or

(ii) not more than \$250 000, in any other case;

(j) require the licensee to pay an additional penalty up to the amount of the remuneration accepted by the licensee for the real estate services in respect of which the contravention occurred.

(2.1) A discipline penalty imposed under subsection (2) (i) may be imposed for each contravention.

8. RESA section 43(3) also allows an order to provide that in the event of a licensee's non-compliance, the Committee may suspend or cancel the licensee's licence.

9. RESA section 44(1) authorizes the Committee to require, by order, that a licensee "pay the expenses, or part of the expenses, incurred by the real estate council in relation to either or both of the investigation and the discipline hearing to which the order relates." Enforcement expenses are subject to maximum amounts set under section 4.2 of the *Real Estate Services Regulation*, B.C. Reg. 506/2004 (the "Regulation").

E. RELEVANT PRINCIPLES

10. The Council has published *Sanction Guidelines* (the "Guidelines") that set out the principles that Discipline Committees will generally follow when deciding on disciplinary penalties. The Guidelines do not fetter the discretion of any Discipline Committee, but serve to enhance transparency, consistency of approach, and fairness. The Committee has considered the principles set out in the Guidelines.

11. As set out in section 2.1.1 of the Guidelines, sanctions serve specific purposes, all of which have an overarching goal of protecting the public:

- a. denouncing misconduct, and the harms caused by misconduct;
- b. preventing future misconduct by rehabilitating specific respondents through corrective measures;
- c. preventing and discouraging future misconduct by specific respondents through punitive measures (i.e., specific deterrence);
- d. preventing and discouraging future misconduct by other licensees (i.e., general deterrence);

- e. educating respondents, licensees and the public about rules and standards; and
 - f. maintaining public confidence in the real estate industry.
12. As set out in the Guidelines, the Committee may apply the following principles:
- a. use corrective sanctions where appropriate (section 2.2);
 - b. consider proportionality (sections 2.3 and 2.4), meaning that the nature and severity of sanctions are proportional to the seriousness of the misconduct, resulting harms, the degree of responsibility or blameworthiness of the licensee, and the totality of the misconduct;
 - c. account for progressive discipline (section 2.5), where a licensee's prior discipline record shows, for example, misconduct of an identical or similar nature;
 - d. consider suspension and fine effectiveness in specific contexts (section 2.6);
 - e. prevent profit from wrongdoing (section 2.7), e.g., to achieve a genuine deterrent effect; and
 - f. consider if misconduct justifying a lengthy suspension justifies cancellation (section 2.8).
13. Also as set out in the Guidelines (section 3.1), the Committee may consider a variety of mitigating and aggravating factors, based on factors set out in such tribunal cases as *Law Society of British Columbia v. Ogilvie*, 1999 LSBC 17, and *Law Society of British Columbia v. Dent*, 2016 LSBC 5. Such factors may include the following:
- a. the respondent's age and experience;
 - b. the respondent's discipline history;
 - c. the nature and gravity of the misconduct, including
 - i. if the misconduct involved fraud, dishonesty or deception;
 - ii. the vulnerability of affected persons, or the general public, e.g., due to lower sophistication, or to a relationship of trust;
 - iii. if the misconduct involved the respondent engaging in misconduct knowing of, willfully blind to, or reckless of rules or standards, including where the respondent received warnings from the Council or others;
 - iv. if the respondent demonstrably and reasonably relied on competent advice (e.g., legal advice); and
 - v. the duration, number of instances, or any pattern of misconduct, e.g., isolated, or repeated, pervasive or systemic;

- d. if and to what extent the respondent obtained or attempted to obtain a financial benefit, or other advantage, from the misconduct;
- e. the extent of harm or consequences to clients, other persons, or the general public;
- f. if the respondent has, prior to or during investigation,
 - i. acknowledged and accepted responsibility for misconduct, or
 - ii. voluntarily taken measures to compensate or mitigate impacts on others, or to avoid recurrence of the misconduct;
- g. if the respondent concealed or attempted to conceal misconduct from, or mislead, affected persons, or other persons, including where the respondent has acted to frustrate, delay or undermine investigations by the Council;
- h. the impact that different forms of corrective, preventative or punitive sanctions might have on a respondent, and how those impacts might achieve specific purposes, e.g., by depriving a respondent of benefits of misconduct, by otherwise deterring a respondent from future misconduct, by deterring others from future misconduct, and maintaining public confidence in the profession and the disciplinary process;
- i. the impact of criminal or other sanctions or penalties, if any, relating to the same conduct; and
- j. the proportionality of sanctions, including parity with sanctions previously imposed for similar misconduct in similar circumstances.

F. SUBMISSIONS

14. While the Committee will summarize some key points, the Committee fully reviewed all submissions.

F.1 The Council's key submissions

15. The Council submitted that the Committee should order
- a. that Mr. Bratch and the Brokerage be jointly and severally liable for a discipline penalty of \$75,000, to be paid within three (3) months of the date of this order, or within such further period as the Council might direct;
 - b. that Mr. Bratch and the Brokerage be (presumably jointly and severally) liable for enforcement expenses of \$63,763.66; and
 - c. that Mr. Bratch and the Brokerage be prohibited from applying for licensing until after
 - i. two (2) years from the date of the order, and

- ii. Mr. Bratch and the Brokerage have paid both the discipline penalty and the enforcement expenses ordered by the Committee.

16. The Council has noted that prior to September 30, 2016, the Act limited monetary penalties to \$20,000 in the case of a brokerage or former brokerage, and to \$10,000 in any other case. The Respondents' conduct did span, however, from about April 2016 to November 2017. As of September 2016, the Legislature amended, *inter alia*, section 43(2)(i) of the Act, to allow for monetary penalties of up to \$500,000 in the case of a brokerage or former brokerage, and up to \$250,000, in any other case.

17. The Council has also noted that, "the findings of misconduct related to the Rxxxxx Property and the Sxxxxxxxxxxx Property occurred in the Old Penalty Regime; the findings of misconduct related to the Lxxxxxx Property and the Brokerage Activity Report occurred in the New Penalty Regime."

18. With reference the *LSBC v. Dent* decision (2016 LSBC 5), the Council referred to four classes of factors, which we quote for ease of reference:

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?

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?

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?

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?

19. The Council submitted that there were few, if any, mitigating factors, but various aggravating factors, and that deterrence should be the primary purpose of the Committee's order.

20. With respect to the nature and gravity of the misconduct, the Council asserted a pattern of misconduct which included "taking advantage of vulnerable homeowners in financial distress, resulting in them entering into a scheme that was disadvantageous to them and at the same time very advantageous to Mr. Bratch". The Council also submitted that Mr. Bratch's conduct involved his targeting vulnerable individuals coupled with motivation for his own personal gain. Further, with respect to the Brokerage and the Brokerage Activity Report, the Council noted that Mr. Bratch acting on the advice of his accountant was a mitigating factor. However, it also submitted that his reliance on his accountant should be given little if any weight, as he had been the sole managing broker of the Brokerage since 2011 and would have had to prepare the Brokerage Activity Report for many years at that point.

21. With respect to Mr. Bratch's character and professional conduct record, the Council submitted that while he and the Brokerage had no discipline history prior to the issuance of the Order in Urgent Circumstances, this factor should be given little weight, given the nature and gravity of the misconduct.

22. With respect to Mr. Bratch acknowledging the misconduct and taking remedial action, it noted "no finding by the Committee that Mr. Bratch has taken responsibility for his actions or expressed any remorse or accountability for his misconduct."

23. With respect to public confidence in the profession and the discipline process, the Council submitted that Mr. Bratch operating a "scheme" with "vulnerable, or less sophisticated real estate market participants, without representation by their own real estate agents or legal advice" shows "a lack of integrity and good character".

24. The Council referred the Committee to various cases, under both the Old Penalty Regime and under the New Penalty Regime, showing the importance of licensees clarifying their role to the parties in transactions, avoiding conflicts of interest, and recommending independent advice where appropriate. Additionally, the Council referred the Committee to cases involving failures to make proper disclosures of interests in trade, misrepresentations in brokerage activity reports, and conduct unbecoming a licensee. The Council suggested various ranges for fines relating to the various types of misconduct.

25. With respect to a period during which the Respondents should not be permitted to apply for licensing, the Council noted that the Respondents had their licences suspended on October 30, 2017, through an Order for Urgent Circumstances. Then on April 3, 2018, the Respondents' licences terminated with the Council. The Respondents have not to date applied for re-licensing. The Council submitted that a two-year prohibition was appropriate, given the nature and severity of the conduct, "while

acknowledging that Mr. Bratch and the Brokerages’ licences were suspended as of October 30, 2017....”

26. With respect to enforcement expenses, the Council provided evidence with respect to Enforcement Expenses of \$63,763.66, as follows:

- a. Investigation expenses (based on an hourly rate of \$100 permitted by s. 4.2(a) of the Regulation): \$4,000;
- b. Legal services (involving two in-house counsel for the liability hearing, and two in-house counsel for the sanction hearing, at hourly rates of \$150): \$41,130;
- c. Administrative expenses (for 4 days of liability hearing and 1 day for sanction hearing): \$7,500, plus further expenses (for deliberation and decision-writing relating to both liability and sanction): \$4,250;*
- d. Court reporter, transcript, video conference expenses, and various miscellaneous expenses such as copying, and GST: \$6,883.66.

* With respect to deliberation and decision-writing time of the Committee, Council refers to Regulation section 4.2, and to RECBC Bylaw 3-8(3), which allows a hearing committee to claim a fixed fee (\$625) for each 7-hour day spent preparing a written decision.

F.2 The Respondents’ key submissions

27. The Respondents provided one page of submissions, which addressed the following points. With respect to the nature and gravity of the conduct:

- a. Mr. Bratch did not target homeowners facing foreclosure but only sent mailers to postal codes;
- b. BC Assessment does not accurately reflect market value;
- c. an option to purchase is used widely in real estate transactions to describe repurchasing terms, and without such a document, there would be no legal document in place;
- d. the purchase of the Lxxxxxx Property did not take place as both parties mutually decided to terminate the contract of purchase and sale, given that the “seller received advice from his lawyer which was referred and set up by me the purchaser”;
- e. the owner of the Sxxxxxxxxxx Property clarified many “misunderstood matters to ensure that all documents, contracts and agreements were made legally, ethically and morally”; and
- f. the arrangement for the Rxxxxx Property was concluded via legal representation and the sellers were unable to provide any testimony or information to the Council.

28. Finally, the Respondents submitted that their suspension already served should be a sufficient suspension. The Respondents had their licences suspended as of October 30, 2017. While the Council advised that their licences were terminated on April 3, 2018, and that Mr. Bratch has not re-applied for re-licensing to date, the interim suspension would have otherwise been in effect for about 3 years and 9 months (as of the end of July 2021). The Respondents also suggested a fine with respect to the Brokerage Activity Report. Mr. Bratch suggested that, "I should not be responsible for the council legal fees."

G. SANCTION DECISION

29. Subject to the Committee accounting for the interim suspensions already "served" by the Respondents, and a reduction to the monetary penalty imposed, the Committee accepted the submissions of Council. The Committee was also largely unpersuaded by the Respondents' submissions concerning the nature and extent of their conduct.

- a. With respect to the Respondents not targeting homeowners in foreclosure, they may have sent their mailings out to a broad audience, but the recipients interested in the rent-to-own arrangement would be those homeowners facing financial difficulties.
- b. The values of homes as assessed by the BC Assessment Authority was, in the absence of the parties providing better evidence, the best available indicator of property values.
- c. The common nature of a written option to purchase does not address the larger issue of a licensee having owners enter into rent-to-own arrangements without having clarified his role as adverse to the owners, and failing to recommend independent legal advice.
- d. The arrangement relating to the Lxxxxxx Property terminated due only to fortuitous legal advice from lawyers retained to carry out an arrangement after the owner signed agreements without independent legal advice. Furthermore, Mr. Bratch and his wife filed a Notice of Civil Claim seeking specific performance or damages. The fact that the arrangement did not complete does not address the conduct at issue.
- e. The Committee has already addressed the circumstances surrounding the Sxxxxxxxxx Property by declining to find conduct unbecoming a licensee by Mr. Bratch, or misconduct and conduct unbecoming by the Brokerage. These circumstances do not, however, eliminate the Committee's finding of professional misconduct by Mr. Bratch.
- f. Similarly, the Committee has already addressed the circumstances surrounding the Rxxxxx Property. Those circumstances do not, however, eliminate the Committee's finding of professional misconduct by Mr. Bratch, and professional misconduct by the Brokerage.

30. The Committee has, however, considered the “time served” by the Respondents. No formal policy governs how the Committee should account for “time served”. Accordingly, the Committee must exercise discretion as to how to account for periods of interim suspension. On the one hand, the Respondents have been subject to a substantial period of suspension. On the other hand, the purpose of an Order in Urgent Circumstances is not to punish, but to protect the public pending a hearing. The Committee declines to apply a mathematical formula to “credit” the Respondents with “time served”. After accounting for all the circumstances, including “time served” but also including a failure of Mr. Bratch to evidence a clear understanding that his conduct was wrong, and why, the Committee has decided that a prohibition against Mr. Bratch reapplying for a substantial period is appropriate. The Committee has also concluded that Mr. Bratch must successfully complete an ethics course. Accordingly, the Committee orders as follows:

- a. that Mr. Bratch and the Brokerage be jointly and severally liable for a discipline penalty of \$45,000, to be paid within three (3) months of the date of this order, or within such further period as the Council might direct;
- b. that Mr. Bratch, at his own expense, register for and successfully complete the Real Estate Institute’s Ethics in Business Practice course, within one (1) year from the date of this order;
- c. that Mr. Bratch and the Brokerage be prohibited from applying for licensing until after
 - i. one (1) year from the date of this order,
 - ii. Mr. Bratch has refrained from serving as an unlicensed assistant for one (1) year immediately prior to any application for licensing,
 - iii. Mr. Bratch has successfully completed the Real Estate Institute’s Ethics in Business Practice course, and
 - iv. Mr. Bratch and the Brokerage have paid both the discipline penalty and the enforcement expenses ordered by the Committee (as addressed further below).

31. The Committee concluded these sanctions will fulfil the purposes set out in section 2.1.1 of the Guidelines, including denouncing the misconduct, deterring of future misconduct by the Respondent, deterring similar misconduct by other licensees, and maintaining public confidence in the real estate industry.

H. ENFORCEMENT EXPENSES

H1. The purpose and discretionary nature of enforcement expenses

32. If a Discipline Committee determines that a licensee has committed professional misconduct or conduct unbecoming a licensee, it may order that the licensee “pay the expenses, or part of the expenses, incurred by the real estate council in relation to

either or both of the investigation and the discipline hearing to which the order relates” (RESA section 44(1)), subject to maximum amounts prescribed by regulation (RESA section 44(2)).

33. In *Jacob Giesbrecht Siemens* (2020 CanLII 63581), a Discipline Committee set out a detailed analysis of the enforcement expense regime under the Act. No part of the reasoning of the Discipline Committee in *Siemens* was considered unreasonable by the Financial Services Tribunal on appeal (FST-RSA-20-A005(a)), apart from noting that the Discipline Committee in *Siemens* did not expressly assess enforcement expenses in the context of the duration, nature or complexity of the hearing and its issues. The FST noted, however, that the Discipline Committee had ordered less than full indemnification, and that the expenses awarded fell within a range of reasonable outcomes given that the legislation and regulations anticipate full or partial indemnification and set maximum rates for enforcement expenses (at para. 132).

34. In *Siemens*, the Discipline Committee set out the following general principles (at paras. 61-63):

[61] The RESA uses the term “expenses” instead of the term “costs”. This choice of wording by the legislature, as well as the specifics of section 4.2 of the *Real Estate Services Regulation*, BC Reg 506/2004 (the “Regulation”), sets the RESA apart from “costs” systems used by courts.

[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 under the RESA has been to allow the Council to establish enforcement expenses through a schedule summarizing such expenses, subject to the Committee requesting that the Council provide further documentation, either at the request of the Respondent or as part of the Committee’s own discretion. 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.

35. The Committee agrees with the analysis set out in *Siemens*, especially at paragraphs 61 to 63 as set out above. Orders for enforcement expenses are a matter of discretion, and serve many purposes, including shifting the expense of disciplinary

proceedings from all licensees to wrongdoing licensees, encouraging consent agreements, deterring frivolous defences, and discouraging steps that prolong investigations or hearings. As also addressed in *Siemens*, the Committee has discretion to order expenses at less than full indemnity.

H2. Elements of enforcement expenses

36. The expense regime under the Act has some notable features. First, the Act uses the term “expenses” instead of the term “costs”, which allows the Discipline Committee to deviate from the “costs” system of the Supreme Court of British Columbia.

37. Second, the power of a Discipline Committee under section 44(1) of the Act to order that a respondent pay “the expenses, or part of the expenses, incurred by the real estate council” authorizes a Discipline Committee to order a partial or full indemnity, subject to the regulations setting maximum amounts pursuant to section 44(2).

38. Third, section 4.2 of the *Real Estate Services Regulation*, BC Reg 506/2004 (the “Regulation”) sets out maximums for specific types of expenses, which might be categorized by stage and by role in the process:

Council investigation expenses (“Investigation Expenses”):

- a. “investigation expenses” (Reg. 4.2(a)): maximum \$100/hour for each investigator;
- b. expenses for “an audit” during an investigation leading to a hearing (Reg. 4.2(b)): maximum \$150/hour (Council employee) or \$400/hour (any other case);
- c. legal counsel, or more precisely, “reasonably necessary legal services” (Reg. 4.2(c)): maximum \$150/hour (Council employee) or \$400/hour (any other case);
- d. disbursements relating to “legal services to the real estate council” (Reg. 4.2(d)): the actual amount of the disbursements;
- e. other reasonably-incurred expenses “arising out of... an investigation leading up to a hearing” (Reg. 4.2(i)): the actual amount incurred;

Council hearing expenses (“Prosecution Expenses”):

- f. legal counsel, or more precisely, “reasonably necessary legal services” (Reg. 4.2(c)): maximum \$150/hour (Council employees) or \$400/hour (any other case);
- g. disbursements relating to “legal services to the real estate council” (Reg. 4.2(d)): the actual amount of the disbursements;
- h. for witnesses attending at the request of the Council (Reg. 4.2(f), (g), and (h)): \$50/day or partial day (non-expert) or \$400/hour (expert), and reasonable travel and living expenses;

- i. other reasonably-incurred expenses “arising out of a hearing” (Reg. 4.2(i)): the actual amount incurred;

Discipline Committee hearing expenses (“Committee Expenses”):

- j. administrative expenses for each full or partial day of hearing (Reg. 4.2(e)): maximum \$1,000 (one member), \$1,500 (three members), or \$2,000 (four or more members);
- k. disbursements relating to “legal services to... the discipline committee” (Reg. 4.2(d)): the actual amount of the disbursements;
- l. for witnesses attending at the request of the Discipline Committee (Reg. 4.2(f), (g), and (h)): \$50/day or partial day (non-expert) or \$400/hour (expert), and reasonable travel and living expenses; and
- m. “other expenses, reasonably incurred, arising out of a hearing” (Reg. 4.2(i)): the actual amount incurred.

Section 4.2 notably contemplates specific expenses of a Discipline Committee, including “administrative expense” based on hearing days and the number of members; up to the actual disbursements for legal services to that Discipline Committee; and up to the actual amount incurred for “other expenses, reasonably incurred, arising out of a hearing”. The reference to “other expenses” would appear to capture any expense for decision-writing under Bylaw 3-8(3). However, the Committee need not decide this point definitively, or address the time it took to draft this decision, given its decision below to award a fixed amount that falls short of a full indemnity.

39. Fourth, although a Discipline Committee may address some types of enforcement expenses based on expenses actually incurred (such as external legal counsel fees, and legal-services-related disbursements), subject to limits under the Regulation, a Discipline Committee may also accept expenses based on a tariff or deemed rate. Proof of actual expenses may, with respect to some categories, require an impractical amount of evidence and hearing time. For example, proof of actual investigation expenses relating to a particular investigator would involve not only the investigator’s personal salary, but also the value of his or her personal benefits, and some proportion of overhead expenses of the Council, such as support staff and office space, allocated to each investigator and further to each matter. In practice, Discipline Committees accept some expenses based on “tariff” rates up to the maximum amount in the Regulation, e.g.,

- a. investigation expenses (Reg. 4.2(a)) at a rate of \$100 per hour for each investigator;
- b. internal audit expenses (Reg. 4.2(b)(i)) at a rate of \$150 per hour for an auditor “regularly employed by the real estate council”;
- c. administrative expenses for each full or part day of hearing (Reg. 4.2(e)) at a rate of \$1,000, \$1,500, or \$2,000 for committees consisting of one, three, or four or more members, respectively;

- d. internal legal counsel fees for investigation or prosecution purposes (Reg. 4.2(c)(i)) at a rate of \$150 per hour for a lawyer “regularly employed by the real estate council”; and
- e. non-expert witness fees (Reg. 4.2(f)) of \$50 for each day or partial day.

40. Fifth, where a Discipline Committee has determined that a licensee has committed professional misconduct or conduct unbecoming a licensee, it will ordinarily order that the licensee pay enforcement expenses. A Discipline Committee may, however, order only partial indemnity for a variety of reasons. A Discipline Committee may also reduce its award of enforcement expenses to account for special circumstances, such as partial success by the Council, or said another way, the divided success of the parties. The Committee notes that the Act only provides for awards of enforcement costs to the Council and against a licensee, and not *vice versa*.

41. Finally, enforcement expenses are discretionary. A Discipline Committee may consider any factors it deems relevant, including the nature of the misconduct, the licensee’s failure to acknowledge any error, and the relative success of the parties.

H3. Enforcement expenses in this case

42. This is a proper case for the discipline committee to order that the Respondents pay enforcement expenses.

43. Given the number of multiple arrangements at issue, the Committee accepts that the time spent by investigators during the investigation was reasonable. Similarly, given the number of issues at the hearing, the total time spent by legal counsel, and length of the hearing, was reasonable. No hearing time was wasted. Indeed, the Discipline Committee recognizes the Council and its lawyers have latitude to decide how to investigate and prosecute a case, and it will conclude only in exceptional cases that an investigation was excessive, or that any part of a hearing and its related expenses was unnecessary.

44. However, the Committee has also accounted for some small degree of divided success. While the Council established professional misconduct against Mr. Bratch, the Council did not establish professional misconduct against the Brokerage in all cases, and it did not establish conduct unbecoming for all the arrangements. This was a case where much of the conduct at issue, namely the rent-to-own arrangements, could only be addressed as a conduct unbecoming issue.

45. In all the circumstances, while the Council has sought enforcement expenses of \$63,763.66, the Committee decided to exercise discretion to order enforcement costs of \$50,000. This is about 78 percent of the indemnity allowed by the Regulation. The Committee decided that this amount achieves the goal of shifting an appropriate portion of enforcement expenses to the Respondent. This order does not impugn the jurisdiction of any Discipline Committee to order enforcement costs on a full-indemnity basis in appropriate cases.

I. DISCIPLINE ORDER

46. The Committee orders as follows:

- a. that Mr. Bratch and Bratch Realty Ltd. pay, and be jointly and severally liable for, a discipline penalty to the Council in the amount of \$45,000, within three (3) months from the date of this order, or within such further period as the Council might direct;
- b. that Mr. Bratch, at his own expense, register for and successfully complete the Real Estate Institute's Ethics in Business Practice course, within one (1) year from the date of this order;
- c. that Mr. Bratch and Bratch Realty Ltd. pay, and be jointly and severally liable for, enforcement expenses to Council in the amount of \$50,000, within six (6) months from the date of this order, or within such further period as the Council might direct; and
- d. that Mr. Bratch and the Brokerage be prohibited from applying for licensing until after
 - i. one (1) year from the date of this order,
 - ii. Mr. Bratch has refrained from serving as an unlicensed assistant for one (1) year immediately prior to any application for licensing,
 - iii. Mr. Bratch has successfully completed the Real Estate Institute's Ethics in Business Practice course, and
 - iv. Mr. Bratch and the Brokerage have paid both the discipline penalty and the enforcement expenses.

J. RIGHT OF APPEAL

47. The Respondent has a right to appeal to the Financial Services Tribunal under RESA section 54(1)(d). The Respondent will have 30 days from the date of this sanction

decision: see *Financial Institutions Act*, RSBC 1996, ch 141, section 242.1(7)(d) and *Administrative Tribunals Act*, SBC 2004, section 24(1).

Dated at VANCOUVER, BRITISH COLUMBIA this 29th day of July 2021.

FOR THE DISCIPLINE HEARING COMMITTEE

“YASIN AMLANI”

Yasin Amlani
Discipline Hearing Committee
Chairperson

“ROBERT GIALLORETO”

Robert Gialloreto
Discipline Hearing Committee Member

“SUKH SIDHU”

Sukh Sidhu
Discipline Hearing Committee Member