

Citation: Song (Re), 2023 BCSRE 30
Date: 2023-09-07
File No. INC 3990

**IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
SBC 2004, c 42 as amended**

AND IN THE MATTER OF

**YU (DAVID) SONG
(180405)**

AND

**MENETHIL PROPERTIES LTD.
(X035288)**

DECISION ON LIABILITY AND SANCTION

[This Decision has been redacted before publication.]

Date of Hearing: May 29-30, 2023
Written Submissions Received:
June 2, 7, 26, 30, 2023

Counsel for BCFSA: Meredith MacGregor

Counsel for Licensees: David Chen
Ji Hye Lee

Hearing Officer: Andrew Pendray

Introduction

1. On April 14, 2023, the B.C. Financial Services Authority (“BCFSA”) issued an Amended Notice of Discipline Hearing which alleged that Menethil Properties Ltd. (the “Brokerage”) had committed professional misconduct within the meaning of section 35(1)(a) of the *Real Estate Services Act* (“RESA”) by breaching sections 75, 79, 80 and 81 of the *Real Estate Services Rules* (“Rules”).
2. The April 14, 2023 Amended Notice of Discipline Hearing further alleged that the managing broker of the Brokerage, Yu (David) Song, had also committed professional misconduct within the meaning of section 35(1)(a) of RESA by failing to ensure the Brokerage complied with the requirements of sections 75, 79, 80 and 81 of the Rules, and by failing to respond promptly to BCFSA’s requests for information and documents, contrary to section 21 of the Rules.
3. In general terms, the allegations against the Brokerage and Mr. Song are that they failed to file with BCFSA financial statements that are required by the Rules, that they failed to properly maintain financial records as required by the Rules, and that they failed to respond to requests for information from BCFSA as required by the Rules.
4. An oral hearing into the allegations set out in the Amended Notice of Discipline Hearing was held pursuant to section 42 of RESA. BCFSA was represented by staff legal counsel. Mr. Song and the Brokerage (collectively the “respondents”) were self-represented at the oral hearing.
5. Subsequent to the oral hearing, Mr. Song and the Brokerage retained legal counsel who provided written submissions on their behalf in respect of sanctions.

The Notice of Discipline Hearing

6. The Amended Notice of Discipline Hearing alleged that:
 1. The Menethil Properties Ltd. (the “Brokerage”) committed professional misconduct within the meaning of section 35(1) of RESA in that the Brokerage:
 - a. failed to file its required review engagement financial statement, accountant’s report and/or brokerage activity report for the year ending September 30, 2021 (due on January 31, 2022), contrary to section 75 of the Rules.

- b. failed to file its required review engagement financial statement, accountant's report and/or brokerage activity report for the year ending September 30, 2022 (due on January 31, 2023), contrary to section 75 of the Rules.
- c. failed to prepare or retain financial records necessary to ensure the appropriate and timely accounting of all transactions relating to real estate services provided by the brokerage and its related licensees, contrary to section 79 of the Rules, in particular either or both of the following:
 - i. Bank reconciliations and bank statements for the Brokerage's general account for the months of July 2022, August 2022 and September 2022; and
 - ii. Individual trust ledgers and trust liability and asset reconciliations for all brokerage trust accounts for the months of July 2022, August 2022 and September 2022, specifically but not limited to the brokerage trading services trust account.
- d. failed to do one or more of the following, contrary to section 80 of the Rules:
 - i. Prepare and retain a record showing amounts received and disbursed, the reason for the receipt or disbursement, and any unexpended balance;
 - ii. Prepare and retain monthly reconciliations of banking statements with the record referred to in paragraph (i), prepared in a timely fashion but no later than 5 weeks after the end of the month being reconciled.
- e. failed to prepare and retain a monthly trust liability and asset reconciliation for any pooled trust accounts, prepared in a timely fashion but no later than 5 weeks after the end of the month being reconciled, for the

months of July 2022, August 2022 and September 2022, contrary to section 81 of the Rules.

2. You committed professional misconduct within the meaning of section 35(1) of the RESA in that, while the managing broker of the Brokerage, you:
 - a. failed to ensure the Brokerage complied with s. 75 of the Rules, as alleged at paragraph 1, contrary to section 6(2)(b) of RESA and sections 28(1)(a) and (b) of the Rules.
 - b. failed to ensure that the Brokerage complied with ss. 79, 80 and 81 of the Rules, or any of them, contrary to section 6(2)(b) of RESA and sections 28(1)(a) and (b) of the Rules.
 - c. failed to respond promptly to BCFSA's requests for information and documents sent by BCFSA on September 1, 2022 in relation to a BCFSA audit report dated February 25, 2022, contrary to section 21 of the Rules.

7. At the hearing of this matter, BCFSA sought to amend the Amended Notice of Hearing, by including allegations regarding section 72 of the Rules. Those allegations were as follows:
 - 1(f) failed to ensure that the monthly reconciliations under section 80(b) and monthly trust liability and asset reconciliations under section 81(b) are reviewed, dated, and initiated by a manager broker or a person designated by a related managing broker contrary to section 72 of the Rules.
 - 2(b) failed to ensure that Menethil Properties complied with ss. 72, 79, 80 and 81 of the Rules, or any of them, contrary to section 6(2)(b) of RESA and sections 28(1)(a) and (b) of the Rules.

[emphasis indicates the additions sought]

8. Mr. Song indicated that he did not object to the further amendments to the Amended Notice of Hearing, and as a result those amendments were granted.

Jurisdiction and Procedure

9. Pursuant to section 2.1(3) of RESA 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 42 through 53 of RESA.
10. Although the liability and sanction portions of decisions are generally held separately, in this case counsel for BCFSA informed Mr. Song prior to the hearing that counsel for BCFSA intended to proceed on both liability and sanctions at the scheduled hearing. Mr. Song acknowledged at the hearing of this matter that he did not object to this process. As a result, this matter proceeded on both the issues of liability and sanction.
11. BCFSA must prove its case on the balance of probabilities, that is, it must prove that it is more likely than not that the facts as alleged occurred. In order to make a finding against the respondents, I must find that the evidence is “sufficiently clear, convincing and cogent” to satisfy that test: *FH v McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41.
12. Evidence is generally considered as a matter of procedure¹. As an administrative tribunal the Superintendent is not bound by court rules of evidence, and in the absence of any statutory provision to the contrary, may consider any evidence it considers relevant, including hearsay evidence: *Adams v. British Columbia (Superintendent of Motor Vehicles)*, 2019 BCCA 225 (CanLII).
13. Further, the fact that the legislation may provide for a formal structure for enforcement proceedings does not preclude hearsay evidence from being admitted at a hearing². There is no provision in RESA which imports civil or criminal rules of evidence into the administrative proceedings held by the Superintendent. The Superintendent may, however, draw upon principles underlying court rules of evidence to exclude or assess evidence.
14. The Superintendent must also afford procedural fairness to a respondent where a decision may affect his or her rights, privileges or interests. This right includes a right to be heard. The Superintendent affords every respondent an opportunity to respond to the case against him or her by providing advance notice of the issues and the evidence, and an opportunity to present evidence and argument. The Superintendent must determine facts, and decide issues set out in the Notice of Discipline Hearing, based on evidence. The Superintendent may, however, apply its individual expertise and judgment to how it evaluates or assesses evidence.

¹ *Cambie Hotel (Nanaimo) Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2006 BCCA 119, para. 38.

² *Cambie Hotel*, paragraph 38.

Issues

1. At the outset of the hearing of this matter, Mr. Song and the Brokerage admitted a number of allegations against them.
2. Specifically, the Brokerage admitted the allegations set out at items 1(a) and 1(b) of the Amended Notice of Hearing. Mr. Song, for his part, admitted the allegations set out at items 2(a) and 2(c).
3. Mr. Song indicated, at the time of the oral hearing, that he and the Brokerage disputed the remaining allegations relating to sections 72, 79, 80, and 81 of the Rules.
4. Subsequently however, in his written submissions, Mr. Song indicated that he did “not contest the non-compliance with [the] rules...alleged by” BCFSA³ and he was no longer contesting any of the allegations set out in the Amended Notice of Hearing.
5. As a result, the issue with respect to liability to be:
 - Does the conduct admitted to by the Respondents amount to professional misconduct?
6. The issue with respect to sanction is:
 - What are the appropriate sanctions for the professional misconduct of the Brokerage and Mr. Song?

Background and Evidence

7. The documentary evidence and information before me consisted of an Agreed Statement of Facts, various documents set out in a Book of Documents (as well as supplemental books of documents and a list of documents), and a memorandum from Accel CPA to BCFSA. I also heard testimony from [Auditor 1], Audit Specialist from BCFSA; [Auditor 2], Manager of Audit and Assurance from BCFSA, and from Mr. Song.
8. While I have reviewed and considered all of the evidence and information before me, the following background summary is not intended to be a recitation of that evidence. Rather, it is intended to provide context for my reasons.

³ Song and Menethil submissions, June 22, 2023, page 3.

Licensing History

9. Mr. Song was first licensed in B.C. as an Associate Broker from March 2018 to January 20, 2020. Since January 20, 2020, Mr. Song has been licensed as a Managing Broker at the Brokerage. Mr. Song also has a secondary licence as Managing Broker of Menethil Properties Ltd. (Vancouver) which commenced June 21, 2022.
10. Mr. Song had no prior discipline history. In his testimony, Mr. Song indicated that he had also been licensed in Alberta and Saskatchewan.
11. The Brokerage has been licensed since January 20, 2020. It provides trading and rental property management services.
12. On August 26, 2022, the Brokerage received an administrative penalty for failing to respond to a variety of inquiries from BCFSA which occurred between February and July 2022. That administrative penalty was confirmed in a December 15, 2022 decision.

Section 75 Filings

13. On October 14, 2021, BCFSA sent Mr. Song an email reminding that the Brokerage's annual section 75 report filing for the fiscal year ending September 30, 2021 was due 120 days from the end of the fiscal year. The due date for that filing was therefore January 31, 2022.
14. Mr. Song wrote to BCFSA to request an extension to the section 75 deadline on January 10, 2022.
15. As [Auditor 1] noted in her testimony, that extension request was not granted.
16. On February 10, 2022 [Auditor 1], on behalf of BCFSA, wrote to Mr. Song. In that letter [Auditor 1] noted that Mr. Song and the Brokerage had failed to provide the section 75 filings by January 31, 2022, as required by sections 28 and 75 of the Rules. [Auditor 1] noted that administrative penalties could be imposed on both the Brokerage and the managing broker for the failure to file the required documents, and that Mr. Song may also be found in contravention of section 21 of the Rules. The February 10, 2022 letter indicated that a complete section 75 filing was required by February 28, 2022.
17. On September 21, 2022 BCFSA again contacted Mr. Song. In that email BCFSA noted that the Brokerage's section 75 filing remained outstanding for the 2021 fiscal year.

18. On November 21, 2022 BCFSA sent an email to Mr. Song reminding him that the 2021 section 75 reports remained outstanding, and that the due date for the 2022 section 75 reports was approaching.
19. On November 24, 2022, Mr. Song wrote to [Auditor 1] and indicated that the section 75 reports for fiscal year 2021 “should be completed in about 1.5 weeks”, and that he anticipated having the section 75 reports for the 2022 fiscal year “on time”.
20. On February 27, 2023 [Auditor 1] wrote to Mr. Song, noting that the Brokerage’s section 75 filing for the 2022 fiscal year had not been received by January 31, 2023 as required. In that February 27, 2023 letter, [Auditor 1] indicated that Mr. Song was required to provide the complete section 75 filing by March 6, 2023, and that if the filing was not received by BCFSA by that date, Mr. Song and the Brokerage may be subject to further discipline proceedings.
21. On April 14, 2023, BCFSA wrote to Mr. Song, again reminding him that the 2021 and 2022 section 75 filings remained outstanding.
22. As of the date of the hearing, Mr. Song had not provided BCFSA with either the 2021 or 2022 section 75 filings. [Auditor 1] noted in her testimony that she had not heard from Mr. Song regarding either the 2021 or 2022 section 75 filings subsequent to his email of November 24, 2022.

Audit Requests

23. On February 25, 2022, [Auditor 2], on behalf of BCFSA, wrote to Mr. Song and enclosed an audit report in relation to an audit of the Brokerage that had occurred on October 12, 2021. That audit report identified a number of deficiencies, as well as a number of documents and information requests (the “February 2022 Requests”). The audit noted issues with respect to trust records, including concerns with respect to the Brokerage’s compliance with sections 80 and 81 of the Rules. [Auditor 2] requested that Mr. Song provide a written response to the deficiencies identified by March 11, 2022.
24. [Auditor 2] testified that he and another auditor had subsequently attended the Brokerage in June 2022 in order to review financial documents and to explain to Mr. Song what was required of him in terms of maintaining financial documents.
25. On July 27, 2022, BCFSA sent Mr. Song a non-compliance warning letter in relation to the February 2022 Requests. That letter specifically indicated that although a notice of administrative penalty was not being issued at that time, BCFSA considered that Mr. Song was contravening section 21 of the Rules by failing to reply promptly to the February 2022 Requests. Attached to the July 27, 2022 letter was an appendix, dated July 12, 2022, and prepared by [Auditor 2].

That Appendix set out the information that [Auditor 2] considered to be outstanding in relation to the February 2022 Requests. The July 27, 2022 letter noted that continued non-compliance could lead to administrative penalties or further disciplinary action.

26. On August 4, 2022 Mr. Song indicated that he had mailed a cheque to BCFSA⁴, and indicated that he would provide a response to the outstanding requests for information.
27. BCFSA sent a further follow-up email regarding the February 2022 requests to Mr. Song on August 10, 2022, and again on August 17, 2022.
28. Mr. Song wrote to BCFSA on August 18, 2022, indicating that he had misunderstood the requests from BCFSA.
29. On August 24, 2022, Mr. Song emailed BCFSA and attached a letter dated August 3, 2022. That letter contained responses to the February 2022 Requests which were, in [Auditor 2]'s view, substantive.
30. As noted above BCFSA issued the Brokerage an Administrative Penalty in the amount of \$6,250 in relation to a contravention of section 21 of the Rules, specifically the Brokerage's failure to respond promptly to the inquiries issued by BCFSA in February 2022 and beyond regarding the audit.
31. Subsequent to the issuing of the Administrative Penalty, an audit coordinator for BCFSA sent Mr. Song, on September 1, 2022, an email requesting information further to his August 24, 2022 responses in respect of the February 2022 requests. Those new requests (the "September 2022 Requests") from BCFSA included that Mr. Song provide:
 - Confirmation that the brokerage would be maintaining a general ledger and account reconciliation on a monthly basis as required by sections 79, 80 and 81 of the Rules;
 - Reconciliations, trust asset and trust liability ledgers for the general brokerage bank account and all brokerage trust accounts, and the general ledger, for July 2022 (due September 7, 2022), August 2022 (due October 6, 2022), and September 2022 (due November 7, 2022)
32. BCFSA wrote Mr. Song again on September 14, 2022, following up on its September 2022 Requests. Mr. Song replied on that date and indicated that the Brokerage was in the process of preparing for year-end accounting, and was also in the middle of "acquiring one of the property managers file" to clear the "old book",

⁴ Although unclear, it would appear that Mr. Song was attempting to pay an administrative penalty.

- which was requiring a great deal of resources. Mr. Song requested an extension to reply to the September 2022 Requests until mid-October.
33. On September 21, 2022 BCFSA again contacted Mr. Song, noting that he had not yet responded to the September 2022 Requests.
 34. On October 21, 2022, BCFSA issued a non-compliance warning letter to Mr. Song in relation to the September 2022 Requests. That letter indicated that Mr. Song was required to comply with the Rules and to respond to the requests by November 4, 2022.
 35. It was not until November 8, 2022 that Mr. Song replied to BCFSA. In an email of that date Mr. Song provided a number of documents relating to the Brokerage's 2021 financial year end.
 36. On November 9, 2022 BCFSA wrote to Mr. Song acknowledging receipt of the documents attached to his November 8, 2022 email. BCFSA noted, however, that the documents provided by Mr. Song did not address the requests made by BCFSA on September 1, 2022. Specifically, BCFSA indicated that the November 8, 2022 email appeared:

...to attach draft financial statements for the fiscal period ending September 30, 2021 in relation to item 2 in the Non-Compliance Warning Letter. The purpose of the transfer of funds noted in Observation #4 of the Audit Report is not clear in the statements provided, or the adjusting journal entries provided, or through notes or adjusting entries. Your response to the Audit Report indicated that the financial statements would be responsive to the issue identified in Observation #4, notably that "the managing broker must prepare and retain financial records in connection with its business that are necessary to ensure the appropriate and timely accounting of all transactions relating to real estate services provided by the brokerage and its related licensees." BCFSA would expect a responsive answer on item 2 to include indication in the entries as to the purpose of the transaction and the deal or matter it relates to.

Therefore, BCFSA considers that all items outstanding in the Non-Compliance Warning Letter remain outstanding.

37. On November 29, 2022 BCFSA wrote to Mr. Song confirming that he had replied to item two of the September 1, 2022 requests, but that responses in respect of the remainder of the September 2022 Requests remained outstanding. BCFSA

noted in its letter of that date that section 21 of the Rules required prompt responses from Mr. Song.

38. Mr. Song did not reply to the November 29, 2022 BCFSA email.
39. On May 25, 2023, Mr. Song provided BCFSA responses to items 1 and 3(a) to 3(c) of the September 1, 2022 requests. Specifically, Mr. Song indicated that he would be maintaining a general ledger and account reconciliation on a monthly basis going forward. He also indicated that he had attached the reconciliations, trust asset and trust liability ledgers for the general brokerage bank account and all brokerage trust accounts managed by the brokerage, and the general ledger for the months of July, August, and September 2022.

Evidence of Mr. Song

63. Mr. Song testified that the Brokerage and two of its rental property managers had become involved in litigation with another real estate brokerage, and that this litigation had taken a great deal of his focus, as well as caused a significant financial strain. Mr. Song indicated that his failure to file the 2021 and 2022 section 75 filings was due to the fact that he had to allocate funds towards paying the legal bills associated with that litigation, and that as a result he had not had the funds available to pay the accountants required to complete the section 75 filings.
64. With respect to the delay in responding to the September 2022 Requests, Mr. Song described having been experiencing stress and depression associated with the lawsuit.
65. When asked why he had not provided any update to BCFSA regarding the filing of the section 75 reports subsequent to November 24, 2022, Mr. Song indicated that he had intended to deal with the issue. He similarly acknowledged that he had failed to provide updates to BCFSA regarding the outstanding September 2022 Requests, but noted that he had in fact prepared the requested reconciliations.
66. Mr. Song acknowledged that the dates on some of the reconciliations he provided to BCFSA in May 2023 had been completed beyond the five-week deadline set out in sections 80 and 81 of the Rules. He further acknowledged that some of those reconciliation documents had not been dated or signed, as was required by the Rules.

Reasons and Findings on Liability

Does the conduct admitted to by the Respondents amount to professional misconduct?

67. As indicated above, at the outset of the hearing Mr. Song, on behalf of the Brokerage, admitted that the Brokerage had committed professional misconduct within the meaning of section 35(1)(a) of RESA by failing to provide its section 75 filings for the fiscal years of 2021 and 2022 as required by the Rules. In subsequent written submissions, Mr. Song indicated that he did not dispute the breaches of the Rules alleged by the BCFSA as set out in the Notice of Hearing.
68. Section 35(1)(a) of RESA sets out that a licensee commits professional misconduct if the licensee contravenes RESA, the Regulations, or the Rules.
69. Despite the admissions of the breaches of the Rules, I consider it necessary to determine whether the conduct admitted to by the Respondents amounts to professional misconduct.

The Brokerage

Section 75

70. I have no difficulty finding that the Brokerage had breached s. 75 of the Rules, and that it therefore, by definition, committed professional misconduct.
71. Section 75(1) of the Rules sets out that a brokerage must, within 120 days after the end of each fiscal year of the brokerage, file with the Superintendent:
 - (a) Financial statements for that fiscal year,
 - (b) An accountant's report respecting that fiscal year, completed in accordance with any requirements specified by the Superintendent, and
 - (c) A brokerage activity report respecting that fiscal year, completed in accordance with any requirements specified by the Superintendent.
72. Section 75(2) further provides that the financial statements referred to in section 75(1)(a) must be audited by an accountant in the case of a brokerage that is a public company, or, in any other case, have been subject at a minimum to a review engagement by an accountant, unless the Superintendent has authorized a brokerage to file financial statements that have been subject to a notice to reader.
73. In this case, the documentary evidence, as well as the evidence provided by [Auditor 1], made clear that the Brokerage had not filed either its 2021 or 2022 section 75 filings by the time of the hearing in May 2023. Those section 75 filings were due on January 31 of 2022 and 2023 respectively.

74. Given the fact that section 75 specifically sets out that a brokerage must make the filings within 120 days of the end of each fiscal year, and the fact that the Brokerage had not made either the 2021 or 2022 filing within that 120-day period, I consider the contravention of section 75 of the Rules to be clear.
75. As Section 35(1)(a) of RESA sets out that a licensee commits professional misconduct if the licensee contravenes the Rules, and I have found that the evidence supports a conclusion that the Brokerage contravened section 75 of the Rules, I further find that the Brokerage committed professional misconduct within the meaning of section 35(1)(a).

Sections 72, 79, 80, 81

76. I accept that the evidence and information before me supports a conclusion that the Brokerage contravened each of the above-noted sections of the Rules in respect of the financial records provided for the months of July, August, and September 2022. By definition, those contraventions constitute professional misconduct under section 35(1)(a).
77. Section 79 of the Rules requires that a brokerage must prepare and retain financial records in connection with its business that are necessary to ensure the appropriate and timely accounting of all transactions relating to real estate services provided by the brokerage and its related licensees.
78. Section 80 of the Rules requires that for each account maintained by a brokerage, the brokerage must retain all banking records, prepare and retain a record showing and explaining amounts received and disbursed, and prepare and retain monthly reconciliation of banking statements, prepared in a timely fashion, but no later than five weeks after the end of the month being reconciled.
79. Section 81 of the Rules requires that a Brokerage prepare and retain monthly trust liability and asset reconciliation for each pooled trust accounts, in a timely fashion but no later than five weeks after the end of the month being reconciled.
80. Section 72 of the Rules requires that for each trust account of a brokerage, the monthly reconciliation under section 80(b) and the monthly trust liability and asset reconciliation under section 81(b) must be reviewed, dated, and initialed by a related managing broker.
81. Despite repeated requests from BCFSA that the Brokerage provide a variety of financial records (as first set out in the September 2022 Request), the Brokerage

- did not provide those records until approximately six months after the final request for those records.
82. While the Brokerage did eventually, in May 2023, provide BCFSA the financial records required by each of the above-noted sections of the Rules, even on the evidence of Mr. Song, the records provided suffered from a variety of issues.
 83. The notable issue in respect of the financial records provided by the Brokerage in May 2023 was the timeliness, or more specifically the lack of timeliness, of those records.
 84. Even upon providing those records, it was unclear as to when those records were prepared.
 85. As an example, the general ledger for the Brokerage for the period of July through September 2022, when provided by the Brokerage in May 2023, was not dated. Similarly, the general account reconciliation for July, August, and September 2022 were not dated. Nor were any of the trust account ledgers for those months.
 86. Although Mr. Song testified that he had generally prepared the financial records in a timely manner, or at least close in time to what was required by the Rules, given the fact that he did not provide BCFSA with the Brokerage's financial records until some six months after those records had been requested, I consider that Mr. Song's claims of timeliness are entitled to little weight.
 87. In fact, of the ledgers and reconciliation statements provided by Mr. Song and the Brokerage relating to the months of July, August, and September 2022, only the August 2022 trust reconciliation provided by the Brokerage was dated. That document indicates that it was completed on October 16, 2022. This completion date is consistent with Mr. Song's description of having prepared financial records at least close in time to what is required. That does not, however, alter the fact that, relying on the October 16, 2022 date set out on the document, the August 2022 trust reconciliation was also completed more than five weeks after the end of the month being reconciled, and therefore in contravention of the Rules.
 88. Given the above, even if I did not consider that the Brokerage had, in its June 22, 2023 submissions, admitted the allegations set out in the Amended Notice of Hearing, I would have found the evidence before me to have supported that the allegations at items 1(c), 1(d), 1(e), and the additional allegation 1(f) put forth by BCFSA at the hearing, had been made out.
 89. I further consider the evidence to support a conclusion that the Brokerage failed to ensure that the monthly reconciliations were reviewed, dated, and initialed by a managing broker for the months of July and September 2022. As I have indicated

above, the reconciliations for the month of August were dated and initialed, and I am satisfied that those reconciliations complied with section 72 of the Rules.

Did Mr. Song commit professional misconduct within the meaning of section 35(1)(a) of RESA?

90. Again, I consider that Mr. Song has, in his submissions admitted to the allegations set out in the Amended Notice of Hearing, as well as the amendment agreed to on the date of the hearing.
91. Regardless, had Mr. Song not admitted to those allegations, I would have found that the allegations in the Amended Notice of Hearing had been proven on a balance of probabilities.

Failure to Ensure Brokerage Compliance with the Rules

92. Section 6(2)(b) of RESA sets out that a managing broker, in this case Mr. Song, is responsible for the performance of the duties imposed on the brokerage by its licence.
93. Further, section 28(1)(b) of the Rules sets out that a managing broker must ensure that the business of the brokerage is carried out competently and in accordance with the Act, the Regulations and the Rules.
94. I consider the combined effect of section 6(2)(b) of RESA and section 28(1)(b) of the Rules is to make the managing broker responsible for ensuring that a brokerage is complying with its duties under RESA and the Rules.
95. In summary, Mr. Song was responsible for ensuring that the Brokerage filed its 2021 accountant's report, as required by section 75 of the Rules, by January 31, 2022, and that it filed its 2022 accountant's report by January 31, 2023. Similarly, Mr. Song was responsible for ensuring that the brokerage complied with sections 72, 79, 80, and 81 of the Rules.
96. The evidence is that Mr. Song did not do so.
97. Given my findings above regarding the Brokerage, I find that Mr. Song, like the Brokerage, committed professional misconduct in respect of his failure to ensure the Brokerage complied with sections 75, 72, 79, 80 and 81 of the Rules.
98. I find Mr. Song's actions in that regard to constitute professional misconduct, as defined by section 35(1)(a) of RESA.

Section 21 of the Rules

99. Section 21 of the Rules provides that a licensee must respond promptly to any inquiry addressed to the licensee by the Superintendent. Rule 21(2) sets out that a licensee's response must be in writing, and if applicable, be provided to the Superintendent at a date no later than that set by the Superintendent.
100. There is no question that Mr. Song did not reply promptly to inquiries from BCFSA. Mr. Song did not respond to the September 2022 Requests until May 2023. He did not provide any response at all to BCFSA from the date of his November 8, 2022 email until that date.
101. Given those facts, even in the absence of Mr. Song's admission of liability, I would have found the allegation set out at item 2(c) of the Amended Notice of Hearing to have been made out, and that Mr. Song's contravention of section 21 of the Rules constituted professional misconduct as defined by section 35(1)(a) of RESA.

Reasons and Findings on Penalty

102. Section 43(2) of RESA provides that if, after a discipline hearing, the superintendent determines that the licensee has committed professional misconduct, the superintendent 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 superintendent 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 of 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.

103. In general terms, the issuing of sanctions in relation to breaches of RESA is done with an overarching goal of protecting the public.

104. Sanctions may serve multiple purposes, including:

- 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 punitive measures (i.e. specific deterrence);
- preventing and discouraging future misconduct by other respondents (i.e. general deterrence);
- educating licensees and the public about rules and standards; and
- maintaining public confidence in the real estate industry.

105. Administrative tribunals generally consider a variety of mitigating and aggravating factors in determining sanctions, largely based on factors which have been set out in cases such as *Law Society of British Columbia v. Ogilvie*, 1999 LSBC 17, and *Law Society of British Columbia v. Dent*, 2016 LSBC 5. In *Dent*, the panel summarized what it considered to be the four general factors, to be considered in determining appropriate disciplinary action:

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?

106. 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.

Mr. Song

107. BCFSA's starting point was that Mr. Song's managing broker licence ought to be cancelled immediately and in full, with no opportunity for Mr. Song to continue being licensed as an associate broker or representative.

108. In the alternative, however, BCFSA submitted that if the above-noted order was not made against Mr. Song, an appropriate sanction would be as follows:

- Mr. Song and the Brokerage be found jointly and severally liable to pay a discipline penalty to BCFSA in the amount of \$25,000 within three (3) months from the date of this Order;
- Mr. Song's managing broker licence be immediately cancelled, and he be permitted to continue being licensed as a representative; and
- Mr. Song be required to complete the Broker's licensing course prior to applying for licence as an associate broker or managing broker.

109. In his submissions, Mr. Song proposed the following penalty orders⁵:

- Mr. Song and the Brokerage be found jointly and severally liable to pay a discipline penalty in the amount of \$5,000 forthwith;
- Mr. Song's managing broker licence to be immediately cancelled, and he be permitted to continue being licensed as a representative;
- Mr. Song be required to complete the broker's licensing course; and
- Upon completion of the broker's licensing course, Mr. Song's managing broker licence shall be reinstated upon payment of the associated fees, with reinstatement subject to Mr. Song's compliance with the penalty orders.

Severity of Misconduct

110. BCFSA takes the position that Mr. Song has engaged in serious misconduct. It points to what it describes as extensive and persistent non-compliance with the regulatory regime on the part of Mr. Song. Specifically, BCFSA submits that Mr. Song deliberately failed to comply with the section 75 reporting requirements for multiple years, and section 21 of the Rules for a period of more than seven months, despite clear requirements to comply, as well as numerous follow-up requests for compliance.

111. BCFSA submits that compliance with sections 75 and 21 of the Rules are important in that such compliance enables BCFSA to perform its supervisory role and to protect the public. In BCFSA's submissions, Mr. Song's failure to ensure compliance with the section 75 filings, as well as his failure to respond to the September 2022 Requests deprived BCFSA of its ability to gather evidence of risks to the industry and to consumers, assess those risks, and respond to them.

112. It is important to first consider the purpose of the section 75 filing. In [Auditor 1]'s evidence, she indicated that the section 75 filing was relied upon by the regulator to engage in an assessment of a brokerage and to identify any issues or concerns BCFSA may have with a brokerage. Similarly, [Auditor 2] testified that section 75 filings were important factors in enabling BCFSA to perform its supervisory functions. I consider it to follow, from that evidence, that without having the annual section 75 filings for a brokerage, BCFSA may have difficulty in completing its overarching goal of protecting the public.

113. In my view, Mr. Song's failure to comply with sections 75 and 21 of the Rules in this case was severe misconduct.

⁵ Mr. Song indicated that he would accept lesser terms as determined by the Hearing Officer.

114. In reaching that conclusion, I acknowledge Mr. Song's evidence that he, and the brokerage, had been affected by the litigation brought against the Brokerage and its rental property managers. Specifically, Mr. Song indicated that he had been paying the legal fees of the property managers, with a significant portion of the Brokerage's annual expenses in 2020 and 2021 being those legal fees.
115. While I am sympathetic to the financial struggles Mr. Song describes having experienced, I consider it to be telling with respect to the nature of his misconduct that he specifically testified to having made the choice to allocate funds to legal fees associated with the litigation, rather than to pay the accountants to complete the required section 75 filings. I note that in his submissions Mr. Song further indicated that:
- While Menethil had a minor role in the litigation, Menethil and Y. Song were paying the legal fees of [the property managers] because Menethil and Y. Song believed in fighting for fairness for their team.
116. I consider the evidence and information before me to indicate that Mr. Song made a conscious decision to ignore the requirements of the Rules as set out in section 75. While I accept that Mr. Song wished to support his property managers, the fact remains that Mr. Song was licensed as a managing broker. Mr. Song had, in that role, special duties that were required of him under RESA and under the Rules. It was not open to Mr. Song to simply choose to not comply with the rules on the basis that he thought the litigation was of more importance. In my view, for Mr. Song to have done so, is misconduct of a significant nature. As BCFSA submitted:
- This cannot be how a brokerage operates. A brokerage cannot delay filing its Section 75 Filings until it is financially convenient to them.
117. I note further the duration of Mr. Song's failure to comply with the requirements of section 75 of the Rules, and consider that duration to be an aggravating factor.
118. The 2021 fiscal year section 75 filings were made approximately 16 months late, and after the oral hearing of this matter had completed. At the time submissions closed in this matter, the 2022 section 75 filing was more than four months late.
119. Those significant periods of time, combined with the fact that Mr. Song was in fact making a conscious decision not to comply with section 75, serve, in my view, to make clear that the misconduct was severe in its nature.
120. Similarly, Mr. Song delayed replying to the September 2022 Requests for a period of approximately seven months, and provided no update or response to BCFSA in respect of those requests from November 2022 to May 25, 2023.

121. As I have indicated above, the fact that Mr. Song did not provide the requested financial records until just prior to the hearing suggests that he was simply choosing not to comply with the requirements of section 21 of the Rules. Once again, while I acknowledge that Mr. Song may have been focused on the litigation involving the property managers, I do not consider the choice to focus on that litigation to be an excuse for the failure to reply promptly to requests from BCFSA. I note further the fact that even when he did eventually provide the financial records requested by BCFSA in the September 2022 Requests, as I have found above, those records failed to comply with the requirements of the Rules.
122. I acknowledge that there is no evidence of any actual harm caused by Mr. Song's failure to comply with sections 75 and 21. I nevertheless agree with BCFSA that the failure to comply with those sections created the risk of harm, and that the ongoing failure to comply with section 75 in respect of the 2022 fiscal year filings continues to perpetuate that risk.
123. Having found that the misconduct engaged in by Mr. Song was severe in its nature, I turn to the appropriate penalty.

Licence

124. As I indicated in *Re Jacobson*:

[101] In my view, in order to maintain public confidence in the real estate industry and the Superintendent's ability to protect the public, the Superintendent cannot be seen to allow such a lengthy, and (in the sense that Ms. Jacobson did not prioritize bringing the Brokerage back into compliance with section 75) purposeful contravention to occur without issuing a significant consequence to the licensee who has engaged in the contravention.

125. Having regard to the overarching goal of public protection, and the principles of specific and general deterrence, I consider the appropriate penalty in this case to be a financial penalty, as well as the immediate revocation of Mr. Song's managing broker licence.
126. I would, however, permit Mr. Song to continue being licensed as a representative and would not order the full licence cancellation requested by BCFSA.
127. In determining to allow Mr. Song to continue being licensed as a representative, I have considered what I have found to be his severe misconduct, as well as his evidence as to the situation he was in that caused him to engage in that misconduct. I have also considered the fact that, Mr. Song, although having only limited experience as a licensee in B.C., has no previous discipline history.

Although, as I have indicated above, Mr. Song took little to no steps to come into compliance with the requirements of the rules prior to the hearing of this matter, I acknowledge that he was experiencing stress as a result of the ongoing litigation, which resolved just prior to the hearing.

128. While I agree with BCFSA's submission that Mr. Song's misconduct was more significant than that in *Re Jacobson*, in that the duration and extent of the contraventions was more severe, I do not consider the evidence to show that Mr. Song is, in essence, ungovernable, such that he should no longer be licensed⁶.
129. Rather, I consider that the evidence shows that since the resolution of the litigation, Mr. Song has in fact taken steps to come into compliance with the Rules. I note further that the misconduct which Mr. Song has been found to have engaged in largely relates to his role as a managing broker. There are no prior discipline issues relating to Mr. Song as a representative. While I acknowledge BCFSA's position as to the need to be able to have licensees in compliance with the Rules and RESA without having to commence and hold discipline hearings to obtain that compliance, I do not consider that the general deterrence aspects of that proposition can be allowed to outweigh the specific deterrence required in this case.
130. In light of all of the circumstances I am of the view that the requirements of specific and general deterrence can be met with a financial penalty, in addition to the cancellation of the managing broker's licence, with Mr. Song permitted to continue as a representative⁷.
131. I further consider that specific deterrence can be achieved through the additional requirement that Mr. Song be required to complete the Broker's licensing course prior to applying for a licence as an associate broker or a managing broker. I consider it to be clear that Mr. Song requires further education as to his responsibilities under RESA and the Rules, and that the requirement that he participate in such education would achieve that specific goal.
132. I note that I do not agree with Mr. Song's submission that an order be issued that upon completion of the broker's licensing course Mr. Song's managing broker licence shall be reinstated. I consider that the decision to allow Mr. Song to be licensed as managing broker is one that should be left to BCFSA in the ordinary course, by way of application for licensure by Mr. Song.

⁶ I note that I do not intend to indicate that a licensee must be found to be ungovernable in order for full licence cancellation to be ordered. Each case must be decided on its own merits.

⁷ I acknowledge BCFSA's submissions regarding the appropriateness of allowing an individual whose managing broker licence has been cancelled to be licensed as an associate broker. However, given that Mr. Song has not sought to remain licensed as an associate broker, I do not consider it necessary to address that submission here.

Discipline Penalty

133. In submitting that a financial penalty of \$25,000 is appropriate, BCFSA notes that the October 21, 2022 non-compliance warning letter indicated that an administrative penalty of \$2,000, plus \$250 per day could be imposed based on the days after the non-compliance warning period. In BCFSA's submission, given that Mr. Song did not provide the responses to the September 2022 Requests until May 25, 2023, he could have been subject to an administrative penalty of \$52,500.
134. I find this submission to be compelling.
135. The Brokerage submits that a penalty of \$5,000 would be appropriate, and that a penalty of \$25,000 would have a disproportionate impact on them due to their limited earnings in 2021.
136. I note, however, that on their own submissions the Brokerage has been incurring significant expenses related to the litigation. The Brokerage elected to incur those expenses because it believed "in fighting for fairness for their team". As I have indicated above, I do not consider that Mr. Song and the Brokerage's choice to focus on the lawsuit can be permitted to outweigh their responsibility to follow the Rules and RESA. In my view, a penalty of only \$5,000 would not be of sufficient significance to meet the goal of specific or general deterrence from future choices of that nature.
137. On all the evidence, I find that the Brokerage and Mr. Song chose to ignore the requirements of RESA and the Rules, and are fortunate to not have been subjected to the entire administrative penalty amount that could have been incurred. The misconduct in this case was serious, and requires a penalty that ensures that licensees comply with the Rules and RESA. In my view, a penalty of \$25,000 is appropriate in the circumstances.

The Brokerage

138. The parties are in agreement that an order be issued requiring the Brokerage to file its 2022 section 75 of the Rules filings within 45 days of the issuing of this order.
139. I note that in previous cases, orders issued against brokerages have generally set out that the brokerage's licence would be cancelled if the required section 75⁸ filing was not made within 90 days of the order: *Radelet (Re)*, 2013 CanLII 16229 (BC REC); *Dominion Grand Realty Corp (Re)*, 2013 CanLII 65306 (BC REC)⁹. In

⁸ Prior to August 1, 2021, the applicable rule was section 7-7.

⁹ Both *Radelet* and *Dominion* were consent orders.

- another case, *Davreux (Re)*, 2007 CanLII 71632 (BC REC), which proceeded to a hearing, the panel ordered that if the Section 75 Report was not filed within a month, the brokerage would be suspended for 60 days, and if the report was not filed by the end of the suspension, the brokerage's licence would be cancelled.
140. In my view, the order sought in respect of the Brokerage is reasonable and proportionate in view of the contraventions committed on the part of the Brokerage and having considered prior orders issued in similar circumstances.
141. I further consider that order to be in keeping with the overarching purposes of sanctions as discussed above, in that it serves to denounce the misconduct, prevents and discourages future misconduct, and maintains public confidence in the real estate industry.
142. The parties also agree on an order requiring the Brokerage to undergo, at its own expense, an audit conducted by BCFSA within six months of the date of this decision.
143. Given what [Auditor 2] indicated were likely to be further questions in relation to the financial documents provided by the Brokerage on May 25, 2023, as well as the general delay in filing required financial documents, I consider an order requiring that the Brokerage undergo an audit to be reasonable in the circumstances.

Enforcement Expenses

144. Sections 43(2)(h) and 44(1) and (2) of RESA provide that the Superintendent may, after determining a licensee has committed professional misconduct, require the licensee to pay the expenses, or part of the expenses, incurred by BCFSA in relation to either or both the investigation and the hearing to which the order relates. Pursuant to section 44(2)(a), amounts ordered under section 43(2)(h) must not exceed the applicable prescribed limit in relation to the type of expenses to which they relate, and may include the remuneration expenses incurred in relation to employees, officers or agents of BCFSA engaged in the investigation or hearing.
145. Section 4.4 of the Regulation sets out the maximum amounts the Superintendent may order a licensee to pay under section 43(2)(h) in relation to various activities such as investigator costs, legal services costs, disbursements, administrative expenses for days of hearings, witness payments, and other expenses, reasonably incurred, arising out of a hearing or an investigation.
146. BCFSA has submitted a schedule of enforcement expenses, which identifies the hours incurred by in-house BCFSA counsel assigned to the respondents' case both in the lead up and at the hearing of this matter, as well as other administrative

expenses, witness payments, and other costs incurred in respect of the hearing of this matter. That schedule sets out that the total amount of the enforcement expenses is \$14,537.00.

147. Mr. Song and the Brokerage agree to an order that they pay, joint and severally, the enforcement expenses claimed by BCFSA, within 90 days of the order.

148. Given the agreement between the parties, and noting that enforcement expenses are a matter of discretion, I find that the enforcement expenses requested, in the amount of \$14,537.00, should be ordered.

Conclusion

149. I find that Menethil Properties Ltd. committed professional misconduct within the meaning of section 35(1)(a) of RESA as set out at items 1 and 2 of the Amended Notice of Hearing.

150. I further find that Yu (David) Song, while the managing broker of Menethil Properties Ltd., committed professional misconduct within the meaning of section 35(1)(a) of RESA by breaching section 6(2)(b) of RESA and section 28(1)(a) and (b) of the Rules when he failed to ensure that the Brokerage complied with sections 72, 75, 79, 80, and 81 of the Rules; and when he failed to respond promptly to BCFSA's September 1, 2022 requests for information and documents contrary to section 21 of the Rules.

151. Having made those findings, pursuant to section 43 of RESA I order that:

- a. Yu (David) Song and Menethil Properties Ltd. are jointly and severally liable to pay a discipline penalty to BCFSA in the amount of \$25,000 within 90 days from the date of this Order;
- b. Yu (David) Song's managing broker licence is immediately cancelled. Yu (David) Song shall be permitted to continue being licensed as a representative;
- c. Yu (David) Song is required to complete the Broker's licensing course prior to applying for a licence as an associate or managing broker;
- d. Menethil Properties Ltd. must file the financial statements and reports required under section 75 of the Rules for the fiscal year ending September 30, 2022 within 45 days of the date of this Order, or its licence will be cancelled;

- e. Menethil Properties Ltd. shall undergo, at its own expense, an audit by BCFSA within six (6) months from the date of this Order to confirm its compliance with RESA and the Rules; and
 - f. Yu (David) Song and Menethil Properties Ltd. are jointly and severally liable for enforcement in the amount of \$14,537 to be paid to BCFSA within 90 days of this order, pursuant to section 43(2)(h) of RESA.
152. If Mr. Song and/or Menethil Properties Ltd. fails to comply with any term of the above orders, the Superintendent may suspend or cancel their licences without further notice to them, pursuant to sections 43(3) and 43(4) of RESA.
153. Mr. Song and/or Menethil Properties Ltd. have the right to appeal this decision to the Financial Services Tribunal under section 54(1)(e) of the RESA, within 30 days from the date of the decision: *Financial Institutions Act*, RSBC 1996, ch 141, section 242.1(7)(d) and *Administrative Tribunals Act*, SBC 2004, section 24(1).

Issued at Kelowna, British Columbia, this 7 day of September, 2023.

“ANDREW PENDRAY”

Andrew Pendray
Chief Hearing Officer