

No Deposit: Agent's Responsibility



By **Brian Madigan LL.B.**

If the purchaser fails to deliver the deposit, whose responsibility is this? What is the role of the agent?

The Real Estate Council of Ontario (RECO), the regulating body for real estate sales representatives and brokers recently had to consider such matters.

The sellers entered into a listing agreement for their property. They had recently moved out of the Province and a relative in Ontario was acting as a “go-between” with the listing sales representative and brokerage.

On September 23, 2005 the sellers accepted an offer of \$140,000 for their property. According to the original Agreement of Purchase and Sale, the deposit to be made upon acceptance of the offer was \$14,000. The only condition of the sale was that the buyers had to obtain financing by October 11, 2005. The transaction was to close on October 27, 2005.

On October 11, 2005 the buyers requested an amendment to extend the deadline to obtain financing to October 18, 2005, move the closing date to November 4, 2005 and amend the deposit amount from \$14,000 to \$1,000. The sellers signed the amendment agreeing to the changes, on October 11. The deposit of \$1,000 was collected at this time.

The purchasers could not close on the 4th of November. The closing date was extended for another 10 days, and the deal still did not close. The sellers asked for the deposit and decided to list with another brokerage. The listing agreement, in their view had expired since they shortened the date to when they signed, however the brokerage still left it at 31 December, which was the date it had initially proposed.

Here are the **allegations of misconduct** made by RECO against both the sales representative and the supervising broker:

- failed to inform their client when the initial deposit was not received.
- failed to give their clients all the relevant information when the clients were asked to sign the Amendment in respect to the reduced deposit.
- when the buyers requested an extension of time to obtain financing, failing to make reasonable inquiries as to the circumstances and failing to relay these to their clients to enable their clients to make an informed decision.

- failed to make reasonable inquiries before making representations to the sellers about the credit-worthiness of the buyers without some proof thereof.
- failed to take reasonable steps to confirm that the buyer's financing was in place.
- failed to ensure the arrangement for a Power of Attorney or other such document to document the role of the mother of one of the sellers and how offers, negotiations, etc. were to be handled.
- failed to confirm their role in the transaction with all parties particularly as there was inconsistency between the agreement and Confirmation of Representation form.
- failed to advise their client of the process to obtain the deposit when Mutual Consent was not given.

The Discipline Committee accepted the submission that the registrants had **breached** the following RECO Code of Ethics:

Rule 2 Primary Duty to Client

A Member shall endeavour to protect and promote the best interests of the Member's Client. This primary obligation does not relieve the Member of the responsibility of dealing fairly, honestly and with integrity with others involved in each transaction.

Rule 3 Disclosure of Role

At the earliest practicable opportunity, but no later than when the Member accepts an Agency, a Member shall fully disclose in writing the role and nature of the service that the Member shall be providing to the person. The Member shall also disclose the Members' role to others involved in the transaction where appropriate.

Rule 6 Written Transaction Agreements

A Member shall ensure that Agreements regarding Transactions are in writing, expressing the specific terms, conditions, obligations and commitments of the parties to the agreement. A copy of each accepted Agreement shall be furnished to each party upon its final acceptance.

Rule 11 Discovery of Facts

A Member shall discover and verify the pertinent facts relating to the Property and the Transaction relevant to the Member's Client that a reasonably prudent Member would discover in order to fulfill the obligation to avoid error, misrepresentation or concealment of pertinent facts.

Rule 42 Competence

A Member shall render conscientious service with the knowledge, skill, judgment and competence, in conformity with this Code of Ethics and the standards which are reasonably expected of Members. When the Member is unable to render such a service, either alone or with the aid of another Member, the member shall decline to act.

The Discipline Committee assessed fines of \$8,000 each as against the sales representative and the broker.

COMMENT:

This appeared to be a file wildly out of control. Perhaps they were beyond their depth of knowledge. The missing power of attorney was the first indicator. They got the wrong expiry date in the listing. Notably, this was to their advantage.

They failed to explain agency. Even if they were both new to the business, this is one of the essential elements in the basic real estate course. They didn't get the deposit and fooled around with the mortgage approval and reduced deposit.

You might even think that they were motivated by the fact that they were getting double the commission on this deal?

And, when the deal didn't go through, they feigned complete surprise. Actually, had they been on top of things, they would have known and they could have properly advised the sellers.

They had a significant conflict of interest. This was not really mentioned by the Panel, but it should have been.

Both the sales agent and the broker acted in cavalier disregard of the sellers' interests.

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