

## RECO Discipline: Holdover Clauses and Agent Liability



**By Brian Madigan LL.B.**

The Real Estate Council of Ontario recently considered a case involving a holdover clause.

Mr. Jones a sales representative with ABC Brokerage had a listing on a property from 19 November 2005 to 21 March 2006. It provided for a 5% plus GST commission. The listing was placed on MLS.

It was showed by Mr. Brown of XYZ Realty on 16 December 200 throughout the currency of the listing to one of his relatives.

The vendors had become disenchanted with Mr. Jones and this information came to the attention of Mr. Taylor who immediately advised Mr. Brown. Consequently, Brown called the vendor directly to determine the status of the matter. This conversation took place on 4 January 2006. The vendor indicated that then cancellation of the listing agreement would be forthcoming.

Brown and the vendor discussed meeting, but the vendor stated that the listing was still not cancelled. The meeting was postponed. On 6 January, the vendor made the first contact to Mr. Jones listing agent, to request a cancellation.

An appointment was made for 7 January 2006 for a listing presentation by Brown. This meeting went ahead notwithstanding that the MLS still showed the first listing and there was no cancellation produced by the vendor.

Mr. Brown had the Purchaser sign an Offer on 7 January 2006. This was not submitted pending the execution of the new listing agreement.

Two days later, the vendor signed the Cancellation and returned it to ABC Brokerage which signed the agreement effective 10 January 2006. Accordingly, the MLS was amended to shown the cancellation as of that date.

The Cancellation Agreement was drafted on the then current Ontario Real Estate

Association standard form, including the following:

If an offer to purchase or lease, obtained from anyone who was introduced to the property from any source whatsoever while the Listing Agreement was in effect or was shown the property while the Listing Agreement was in effect, is agreed to or accepted by the Seller or anyone on behalf of the Seller within the Listing Period or the Holdover Period provided for in the above described Listing Agreement, the Seller agrees to immediately notify the Listing Broker of the sale/lease and to pay the Listing Broker the commission agreed to in the Listing Agreement.

If however, the offer for the purchase or lease of the Property is pursuant to a new agreement in writing to pay commission to another registered real estate broker, the Seller's liability for commission shall be reduced by the amount paid by the Seller under the new agreement.

Mr. Brown got a one day listing for the property at 5% plus GST. He submitted the Offer and as part of the negotiations agreed to reduce his commission to 4.5% plus GST.

At the time the Sellers were considering the Stirling Offer to Purchase, Mr. Stirling did not refer them to the Cancellation Agreement or indicate that, pursuant to the Cancellation Agreement, they would be obligated to pay Brokerage B any amount by which the commission payable under the Brokerage B Listing Agreement exceeded the amount payable under the Brokerage A Listing Agreement.

That was, of course, the effect of the holdover clause. The extra one half of one percent would go to ABC Brokerage.

Mr Brown was charged with the following disciplinary matters pursuant to the *Real Estate and Business Brokers Act*, in particular:

“Mr. Brown acted unprofessionally as follows:

(a) Withheld submitting the Offer when he ought to have known the ABC Brokerage Listing Agreement was still in effect and until the Sellers entered into the XYZ Realty Listing Agreement with him.

(b) At the time the Sellers were considering the Offer to Purchase, did not refer them to their Cancellation Agreement or indicate that, pursuant to the form Cancellation Agreement, they would be obliged to pay ABC Brokerage any amount by which the commission payable under the ABC Brokerage Listing Agreement exceeded the amount payable under the XYZ Realty Listing Agreement.”

The Discipline Committee reviewed the matter and concluded that Mr. Brown

breached the following ethical guidelines:

**“Rule 1 – Ethical Behaviour** – A Member shall:

(4) render services, including giving advice and opinions, based upon the Member’s knowledge, training, qualifications and expertise.

(5) deal fairly, honestly and with integrity with the public, other Members and third parties.

**Rule 5 – Financial Disclosure** – A Member shall disclose the financial aspects of a Transaction and any personal interest of the member in a matter to the Parties sufficient to enable them to make an informed decision.

**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.”

Consequently, Mr. Brown was assessed an \$8,500.00 fine by RECO.

### **Comment**

This might have been a bigger deal if the vendor had not been annoyed with Mr. Jones the first agent. Although nothing is mentioned specifically, this listing was terminated half way throughout its currency. Rumour had it that the vendor was upset.

It’s also interesting that the Cancellation agreement was not immediately forthcoming. First, the vendor had incorrectly stated that the deal was cancelled. However, the vendor might have been somewhat unaware of the appropriate process.

This is not a case of interference, which would have been a much more serious issue. Here. The vendor wanted out, and Mr. Jones agreed.

So, what did Mr. Brown do wrong? First, he should have inquired and actually “seen” the cancellation. Then, of course, he would then know that it had been cancelled. Next, he should not have prepared an Offer and had it signed. That was premature. Wait, until after the new listing is signed. Otherwise, he was under a legal obligation to submit it on behalf of the purchaser as soon as practicable. However, he missed that point.

Then, given all the potential issues concerning commission, he reduces his commission to 4.5%, but under the holdover clause the vendor has to top this up

to 5% because that's what the first listing agreement says.

So, the final error made by Mr. Brown was failing to advise his new client the vendor about his obligation to pay commission to his previous agent. Actually, there is no real problem here, he can just pay that extra top-up commission himself.

As a rule, I use fictitious names. The actual case is published on RECO's website and is available to the public. For educational purposes, the names of the parties really don't have any bearing. If you need to quote the case, you will have to obtain the proper legal citation.

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