

## RECO Discipline: The Elusive Guaranteed Sale



**By Brian Madigan LL.B.**

The Real Estate Council of Ontario through its Discipline Committee recently had to consider the case of a guaranteed sale.

Briefly, Mr. Smith a real estate agent with 14 years experience was assisting a young couple who wished to downsize. A year previously, he helped them purchase their current home. However, it was too costly to maintain, so they wanted a smaller house.

In the course of acquiring a new house, the subject of the guaranteed sale became topical. The evidence before the Discipline Panel was inconsistent. One matter, however was clear, and that was that Mr. Smith engaged in very sloppy paperwork. In part, this may have been a factor which assisted the Panel in reaching a conclusion favourable to the vendors.

### **FINDINGS BY THE PANEL**

- Michael Smith was in violation of Rules 1(1), 1(2), 2 and 4 of the RECO Code of Ethics.
- Mr. Smith said certain things that could be construed as or believed to be a guarantee of the property.
- Mr. Smith was aware of the perceived misrepresentation and the belief that the Vendors were expecting a guarantee on their property sometime....
- The Vendors discussed a guarantee with Mr. Smith prior to removing their conditions of financing and home inspection on the property.
- Mr. Smith had the opportunity to clarify the entire situation with the Vendors surrounding their perception that he had committed to a guarantee.

- The candour required to have this discussion may have cost Mr. Smith, the listing their property as well as the sale on the property they wished to purchase.
- Mr. Smith failed to address the issue in a manner that removed any hint of misrepresentation and by this failure contravened Rule 1(2).
- In allowing the Vendors to remove the conditions without fully explaining either the guarantee that another agent utilized (that was under discussion) or the guarantee program of his Brokerage, Mr. Smith failed to meet the standards of Rules 1(1) and 2.
- The details of a guarantee program should clearly document that the program is designed to protect the party giving the guarantee rather than the party receiving the guarantee.
- The Vendors should have been made aware that if they entered into a guarantee and their house failed to sell in the prescribed time, that they would have been bound by the most onerous terms of the guarantee.
- It was incumbent on Mr. Smith to ensure that his clients understood the terms of such a guarantee.
- It was also incumbent on him to a) determine the terms of reference of the financing and b) make clear to the Vendors the consequences of waiving the conditions .....
- Mr. Smith repeatedly made reference to an unsigned document outlining the consequences of removing conditions which was purported to be presented on July 20th prior to the purchase. This document should have been signed before the Vendors signed the waiver on July 29. At his own peril, Mr. Smith failed to have this document signed.
- Mr. Smith placed his own interests to complete the sale of new property, ahead of those of his clients who wanted to know that their home would be sold so they would not own two properties.
- Mr. Smith readily admitted that he failed to have a Buyer Agency Agreement executed by the Vendors prior to offers made on several prior properties
- the Buyer Agency Agreement was not executed until after the offer acceptance on the property purchased
- This is a clear violation of Rule 4. Registrants must enter into a written Representation Agreement in all cases before any Offer to Purchase is submitted.

The Committee assessed a fine against Mr Smith in the amount of \$12,000.00.

## **Comment**

This is rather strange a foolhardy behaviour on the part of Mr. Smith. He wanted to do two deals. He wanted to increase the pressure on the clients to complete the two deals.

The vendors were, of course, appropriately cautious. They did not wish to run the risk of carrying two houses. Although there was some inconsistency in the testimony, the file spoke for itself. The paperwork was sloppy. Documents were either not signed or were backdated.

The Act does not permit backdating documents, and certain documents are required to be signed before an Offer is presented. Why weren't they? One can only wonder. It seems rather puzzling!

Also, it is a rather cavalier approach by the agent. Until the tables turned somewhat, by reason of the complaint, it was only the vendors who were at risk. They thought they had a guarantee from Mr. Smith but they didn't. There was nothing in writing. There might have been a potential guarantee from the Brokerage, but it would have contained onerous provisions. If the vendors saw it, they may have backed away from the deal. So, this was kept secret. Otherwise, this was Mr. Smith's saving grace. All he had to do, was pull this document out, explain it to the vendors before they firmed up their purchase and everything would have been fine. Well, everything except for the sloppy paperwork, but no one would likely have ever found out about that.

Although this case was heard in 2008, the applicable laws and ethical guidelines were set out in legislation and regulations that preceded REBBA 2002, the current Act. So, it will be necessary to consider this case in the context of the new Act which is expressed differently.

***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.***

*Brian Madigan LL.B., Realtor is an author and commentator on real estate matters, Coldwell Banker Innovators Realty  
905-796-8888  
[www.OntarioRealEstateSource.com](http://www.OntarioRealEstateSource.com)*