

RECO Discipline: “Your House Sold or I’ll Buy it”



By Brian Madigan LL.B.

You’ve seen these ads, but how do they work in practice?

John Smith was an agent, and he was aware that many other agents were getting listings because they offered to buy the client’s house if it didn’t sell. So, he decided to do the same thing.

On his website he advertised the following:

“Your home sold in a 120 days at a price acceptable to you or I’ll buy it for cash”.

Now, that’s a pretty attractive offer. Who could refuse such a tempting arrangement.

Mr. and Mrs Jones owned a condominium apartment which they were concerned about selling. The units in their building often took months to sell. Consequently, they were both worried and concerned. They wanted to move to a house, but did not have a lot of money. They contacted Mr. Smith to assist them with their sale and purchase. In fact, the husband signed a Buyer Agency Agreement and a Listing agreement with Mr. Smith of ABC Brokerage.

Subsequently, the Mr. Jones submitted an offer on a property listed by ABC Brokerage through Mr. Smith. The offer was conditional on:

- a. Inspection,
- b. Financing, and
- c. On the buyer selling his Property.

The offer also had an escape clause which permitted the seller to continue marketing provided the buyers were given 48 hours notice to waive the condition.

Pursuant to the escape clause the sellers gave the buyers 48 hours to waive the conditions.

Mr. and Mrs. Jones sought to clarify the situation of the guarantee that Mr. Smith would buy the Property within 120 days. To verify this fact, an email containing the following information was sent to Mr. Smith:

*“Mr. Smith,
My husband and I are meeting with the vendors tomorrow night to take out the conditions....However before we do this, Mr. Jones had mentioned to me tonight that he did not remember signing anything for the sold in 120 guarantee that is on your website. We wanted to know if this guarantee is in place if we do not sell in that time.
Please let me know. Preferably by email as Mr. Jones and I both work all day tomorrow.
Thank you very much,
Mrs. Jones”*

By an email Mr. Smith responded:

“Congratulations on your financing! My guarantee is a trade-off guarantee where you buy one of my listings ‘Trade up to one’ and I will guarantee your house or your home sale in 120 days or I’ll buy it at 95% of fair market value (appraisal value). If I was forced to buy your home I would use the commission 6.5% of the listing you bought and then use it as a down payment on your home. My goal is to get you better than 95% of the market value based on our aggressive marketing. I will talk to Individual 3 tomorrow and I suggest you do the same just to go over our marketing efforts and see how we can sell your home expeditiously.”

The Jones’ understood this to mean that Mr. Smith would buy the Property if not sold within 120 days. Relying on this information, they waived the condition of financing and selling their property. They buyers believed that between August 23, 2005 the listing date and a closing date of October 28, 2005 there would be about 70 days. Leaving approximately 60 days in which they would carry two mortgages.

The buyers felt they could comfortably carry two mortgages in that time and after the 120 days if not sold, Mr. Smith would indeed buy the Property in accordance with the guarantee.

When the 120 days expired, Mr. Smith refused to buy the Property.

Although he had a valid Buyer Agency Agreement with the buyers and was also the listing salesperson for the buyers' property, Mr. Smith did not at any time expressly advise the buyers in writing that the guarantee was not applicable to the Property, nor did he expressly advise the buyers in writing of the dangers of waiving the condition to sell before the Property was actually sold.

There was nothing in writing in either of the advertisements or in any other form to indicate that the guarantee program was explained to and either accepted or declined by the buyer. There was also nothing in writing on the website or otherwise except in response to the email on September 5, 2006 to indicate that the guarantee program was actually a trade-up which required that the buyer buy a property listed with Mr. Smith as the seller's representative.

There was nothing in writing to advise the buyers that in this particular case, as the vendor's property was not listed with Mr. Smith as their representative, that therefore the buyers did not qualify for the guarantee program despite the fact that the property they were purchasing was indeed listed with ABC Brokerage.

The RECO Discipline Committee concluded that Mr. **Smith acted unprofessionally** when he:

- 1) ran misleading advertisements on the internet promising to purchase homes within 120 days of listing,
- 2) when he failed to advise the buyers of the consequences in writing of waiving the financing condition and the condition on selling of their home before their home was actually sold despite an express request from the buyers for such advice,
- 3) by allowing the buyers to believe that he would buy their home if it was not sold within 120 days of listing,
- 4) by not documenting the terms of the guarantee on the Internet or in some other form with acknowledgement by the buyers,
- 5) by not documenting that the buyers were aware of the terms of the guarantee and therefore did not protect his buyer clients interests.

The Discipline Committee assessed a \$10,000.00 fine as against Mr Smith and a \$5,000.00 fine as against ABC Brokerage for failing to supervise Mr. Smith.

Comment

This is rather foolhardy. It may very well be that Mr. and Mrs. Jones were young and inexperienced, but Mr. Jones was in the business and his obligation was to protect their interests. All too often, agents are protecting their own interests (read commission) and leave the clients to fend for themselves.

Does this guarantee apply or not? That seems like a simple enough question. If there are conditions or restrictions, then they could easily be published on the website. Then again, that might present a little bit of a problem. Who would do business with Mr. Smith if they knew that they could only buy one of his listings? No one, that's who!

So, he keeps it quiet! But, obviously he knows the particular qualifications on the guarantee that he has in mind. However, does he tell them in time? No, he waits until after they have firmed up the deal. Now, they're stuck. They have to sell, and if they don't they will have to lower the price until they do. What a great little game this is, no guarantee and a seller who will be forced into a quick sale. Mr. Smith might not even have to take out an ad.

RECO made the broker responsible as well. They were to supervise their agents, and know hat they were placing on their websites. This inducement was clearly wrong.

RECO just deals with the disciplinary matter, the financial losses of Mr. and Mrs. Jones can be made the subject of a Court Order in other legal proceedings. That is beyond the jurisdiction of RECO.

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, I have not set them out in detail.

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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