

RECO ~ Multiple Offers and Real Estate Duties



By **Brian Madigan**

This case is an interesting one. What is the duty of a real estate broker if the other sales representative thinks there is a competitive bid situation?

What happens if the buyer thinks there is a competing offer, and there isn't one?

If you are interested, have a look at the following decision made by RECO. The names have been changed, and there was an unsuccessful appeal, so from an educational perspective the relevant facts are set out by the Discipline Panel.

I should point out that all the names are fictitious.

PANEL'S DECISION:

The Panel makes the following findings of fact:

- 1) to 6) intentionally omitted.
- 7.) Bill Holden was a potential purchaser who had established a relationship his own real estate representative Conrad Jones.
- 8.) In March of 2005, Conrad Jones showed Bill Holden a home located at 1-AB Street, City A, Ontario (the "Property").
- 9.) The Property was listed for \$449,000.00. Mr. Smith was the listing salesperson on the Property.
- 10.) On March 7, 2005, Bill Holden viewed the Property for a second time.
- 11.) That same day, Bill Holden decided that he wished to place an offer on the Property. Conrad Jones furnished Holden with comparable sales in the area before arriving at an offer price. Holden decided to make a conditional offer on the Property with a price in the low \$400,000 range. The decision to offer less than the list price was based, in part, on the fact that the Property would need certain upgrades, and based on the fact that the property had been on the market

for awhile.

12.) Subsequent to the preparation of the offer, Conrad Jones' assistant received a call from Mr. Smith who advised that it was possible another offer would soon be received on the Property. This information was relayed to Jones by his assistant.

13.) There was a miscommunication between Mr. Smith and Jones' assistant. Mr. Smith's advice that there might be a competing offer forthcoming on the property was incorrectly relayed to Jones, and then to Holden, to the effect that there was to be a definite competing offer forthcoming.

14.) While Holden and Jones found the existence of a competing offer to be suspicious (given that the Property had been listed since September 2, 2004 without any other offers) Holden was very interested in the Property and did not want to lose it to a competing purchaser.

15.) Holden advised Jones that he was unable to meet to sign the documents until 8:00pm that evening. Accordingly, Jones' colleague, Martha Williamson, contacted Mr. Smith to advise him that Holden would not be able to sign the Offer until approximately 8:00 pm that evening.

Mr. Smith assured Williamson that he would wait for the Offer before presenting all offers to the sellers. At no time during Williamson's conversation with Mr. Smith did he indicate to her that he was not in possession of a competing offer on the Property. At no time did Mr. Smith subsequently contact anyone on behalf of Holden to advise that there would be no competing offer.

16.) That evening, Holden met with Jones for the purposes of signing a significantly revised offer from the offer he had contemplated earlier that day.

In light of the competing offer Holden decided to place an unconditional offer on the Property in the amount of \$450,000.00.

17.) Jones met with Mr. Smith at the Property to give him the Offer. At the time Mr. Smith received the offer from Jones, Mr. Smith was aware that both Holden and Jones were under the mistaken belief that a competing offer was to be presented. Mr. Smith did nothing to dispel that belief.

18.) About forty-five minutes later, Mr. Smith emerged from the property, having presented the Offer to the vendors, and informed Jones that the Offer had been accepted.

19.) On March 13, 2004, Jones advised Holden that (based on a conversation that he recently had with Martha Williamson) no competing offer had been presented.

20.) Holden would not have tendered an unconditional increased offer on the property in the absence of an honest belief that a competing offer for the property

was to be presented in competition with their Offer.

While the Panel is unable to conclude that Mr. Smith ever actually stated that there was another offer in existence, the Panel finds, as a fact, that prior to presenting Holden's offer to the vendors, Mr. Smith knew that Jones (and therefore Holden) was acting under the mistaken belief that a competing offer was to be presented on the evening of the presentation.

Indeed, for him not to know this could only have been as a result of wilful blindness on Mr. Smith's part. Holden's offer had all of the earmarks of an Offer designed to succeed in a competitive situation:

The Offer contained:

- 1) a price in excess of the list price;
- 2) it met all of the vendor's terms with the property inspection clause struck out – despite the fact that the property was clearly in need of cosmetic repair;
- 3) the property had been on the market 95 days in total, had been re-listed and reduced to compete in a hot market: and,
- 4) had been the subject of 25-30 showings with no offers.

These facts – coupled with the fact that Mr. Smith had earlier asked his assistant to contact Jones to advise him of a potential competing offer – were sufficient to put Mr. Smith – or any registrant exercising any reasonable judgment – on notice that a mistake had been made. In addition, the Panel heard evidence of a personal enmity between Mr. Smith and Conrad Jones.

Under the circumstances, and based on the foregoing facts, the Panel must conclude that Mr. Smith is in violation the following rules of the RECO Code of Ethics:

Rule 1 – Ethical Behaviour – A Member shall:

- (2) endeavour to protect the public from fraud, misrepresentation or unethical practice in connection with real estate Transactions
- (5) deal fairly, honestly and with integrity with the public, other Members and third parties;

(The Panel found no evidence of deliberate fraud in Mr. Smith's conduct. However, the Panel finds that the offer would not have been made if the actual situation had been clearly represented as a single offer presentation. Mr. Smith should never have allowed the offer presentation to proceed without clarifying the situation.)

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;

(The Panel wishes to clearly state that a registrant cannot avoid his obligations under the rubric of: “but I was just getting the best deal for my Seller”. The Code is not one sided and it demands diligence and fair dealing for all parties.)

Rule 10 – Misrepresentation or Falsification – A Member shall not make any statement or participate in the creation of any document or statement that the Member knows or ought to know is false or misleading;

(Mr. Smith knew that the offer was being presented under a false understanding of the situation by the purchasers and their agent).

Rule 46 – Unprofessional Conduct – A Member shall not engage in an act or omission relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by Members or the public as disgraceful, dishonourable or unprofessional;

(We are of the view that Mr. Smith’s conduct resulted in the treatment of the public in a disgraceful and dishonourable manner).

In the result, the Panel concurs with RECO’s request for an administrative penalty against Mr. Smith in the amount of \$10,000 to be paid within 60 days.

COMMENT

You might wonder what all this means. Mr. Smith did appeal but that was not successful and therefore does not really have an impact on the conclusions one would draw from this case.

Smith had some positive duties at law. If he thought that he might have misled the buyer or his agent he had a duty to inform them.

In fact, even if they were under the mistaken belief themselves, totally without his involvement in any way, he still had a positive duty to assist them. That is what this case really stands for: the positive duty to be observant and intervene if the opposing parties are acting under a mistake.

In fact, failure to do so, can result in a \$10,000.00 fine.

This is often quoted as a case involving phantom offers, but really it’s not. The result would have been much worse for Mr. Smith had that been the case. This is simply a multiple offer situation. RECO points out the positive duty upon Smith in the circumstances to correct any mistake or misapprehension of either the purchaser or his agent.

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