

S/N 1/2021 – Misrepresenting the Defects Liability Period of a Property to a Buyer and for Failing to Protect and Promote the Interests of their Client, the Seller

Facts of Case

Sometime in January 2017, the Respondent was engaged by the Seller to sell her private condominium (the “**Property**”). The Respondent advertised the Property for sale.

The Buyer saw the Respondent’s advertisement and contacted the Respondent sometime in January 2017. The Buyer then made two viewings of the Property in or about early January 2017 and mid-April 2017.

At the second viewing, the Buyer found many defects in the Property. The Respondent informed the Buyer that the developer would follow up to rectify the defects at the Property as the developer had yet to do so.

Sometime in mid-April 2017, the Buyer made an offer to purchase the Property at \$630,000. The Seller rejected the offer and counteroffered with a selling price of around \$680,000 to \$700,000. The Respondent then asked the Buyer to increase his offer to \$680,000.

Sometime in May 2017, the Buyer asked the Respondent via text message whether the defects in the Property were under the developer’s warranty, and whether the warranty was transferable to the new owner (i.e. the Buyer upon purchase of the Property).

The Respondent sent the Buyer a screenshot of a “Defects Liability Period” clause of a standard Sale and Purchase Agreement that states the “*defects liability period*” is the “*period of 12 months –*

- (a) *from the date the Vendor actually delivers vacant possession of the Unit to the Purchaser; or*
- (b) *the 15th day after the Purchaser receives the documents specified under item 3 of the Payment Schedule, whichever is the earlier”.*

However, the said “*Purchaser*” stated in the said clause 17 referred to the Seller and not a *subsequent purchaser* (i.e. in this case, the Buyer).

The Buyer then asked the Respondent (via text message) for the “*actual top date*”.

The Respondent replied to the Buyer (via text message) that the date of issuance of the Temporary Occupation Permit (“**TOP**”) should be in December, and that the Buyer still had a one-year warranty from the time he takes the keys to the Property.

The Buyer then asked the Respondent (via text message) whether since the TOP was issued in December 2016, the warranty would end in December 2017. The Respondent confirmed (via text message) that the warranty was one year from the time the Buyer takes the keys to the Property. The Respondent gave the Buyer an example where the sale is completed in September 2017, and the warranty would be until August 2018.

Based on the Respondent's confirmation of a one-year warranty, the Buyer was misled to believe that the warranty period would be one year after he receives the keys to the Property (i.e. sometime until August 2018). As such, the Buyer made a firm offer of \$680,000 for the Property, and paid the option fee in May 2017.

Shortly after, in May 2017, the Seller accepted the Buyer's offer to purchase and was prepared to grant an Option to Purchase ("**OTP**") to the Buyer on the condition that the Buyer exercise the option on or after a specific date in October 2017 (and not before), so that the Seller would not need to incur seller's stamp duty of \$27,200. However, the Respondent had instead prepared the OTP such that the effect was that the Buyer had to exercise the OTP before the specific date in October 2017.

The Seller informed the Respondent of this condition, and the Respondent conveyed the condition to the Buyer. The Buyer agreed to this condition. The OTP was granted sometime in May 2017 on this basis, but the Respondent did not record this condition in writing in the OTP. Neither did the Respondent advise or encourage the Seller to seek the advice of a solicitor on whether the Seller's condition for the Buyer to only exercise the OTP on the date agreed in October 2017 should be recorded in the OTP.

The Respondent did not correct her misleading statement or misrepresentation to the Buyer about the warranty period. It was only sometime at the end of May 2017 (i.e. after the OTP had been granted) that the Respondent requested that the Buyer let the Seller have a few more days to reconfirm the warranty period.

Sometime in June 2017, the Respondent informed the Buyer that the warranty period would be ending in October 2017. This was a shock to the Buyer as the Respondent had previously stated that the warranty period would only end in August 2018, and not in 4 months.

The Buyer initially thought of withdrawing from the purchase. However, the Buyer had already obtained a bank loan and any cancellation of the loan would result in a penalty fee of around \$10,000. The Buyer decided to carry on with the purchase due to the penalty fee and the Respondent's assurance that the Seller had agreed and was willing to rectify the defects before the warranty period ended in October 2017.

The Buyer had engaged an inspection company to inspect the Property for defects. A list of defects was given to the Seller to rectify sometime in July 2017. Sometime in

August 2017, a second inspection was carried out and the defects were not rectified. The Buyer checked with the developer's staff who told the Buyer that the developer had not received the defects list. When the Buyer asked the Respondent what was being done, the Respondent said that she had not received the defects list from the second inspection. The Buyer then forwarded both defects lists to the Respondent at the end of August 2017.

As there was no update from the Respondent for some time as to the status of the rectification of defects, the Buyer asked the Respondent to suggest to the Seller to make an application to extend the developer's warranty. However, the Respondent replied the Buyer on 13 September 2017 that the developer and the Seller had issues with the Buyer's suggestion because he was not the actual owner of the Property yet.

The Buyer then proceeded to exercise the OTP sometime in September 2017 and took over the Property thereafter. The Buyer had to rectify the defects and paid \$20,000.

As a result of the Buyer exercising the option before the prior agreed date in October 2017, the Seller had to pay seller's stamp duty of \$27,200.

Charges

The Respondent faced the following 3 charges:

Charge 1

For failing to check and ensure that the Buyer would be entitled to a warranty period (or defects liability period) for year after the Buyer receives the keys to the Property (and/or until August 2018), before informing him of the same under paragraph 5(1) of the Code of Ethics and Professional Client Care ("**CEPCC**").

Charge 2 (Proceeded)

For misrepresenting to the Buyer that the warranty period (or defects liability period) for the Property was until 1 year after the Buyer receives the keys to the Property (and/or until August 2018), when the warranty period (or defects liability period) in respect of the Property was actually only until October 2017 under paragraph 6(3) read with 6(4)(c) of the CEPCC.

Charge 3 (Proceeded)

For failing to ensure that the Seller's condition for the Buyer to only exercise the OTP to the Property on the prior agreed date in October 2017 was recorded in the OTP For issuing the OTP for the Property without procuring the signatures

of the sellers while acting for the Seller in the sale of their property under paragraph 6(1) read with 6(2)(a) of the CEPCC.

Outcome

Pursuant to a plea bargain, the Respondent pleaded guilty to Charge 2 and Charge 3, while Charge 1 was taken into consideration for purposes of sentencing.

In sentencing, the DC considered that in relation to the Charge 2, the misrepresentation pertaining to the warranty period was not in dispute. However, the DC was of the view that based on the facts, it appeared that the Respondent had an incorrect understanding of the warranty period and it was not dishonest.

The DC was of the view that Charge 3 was the more serious charge. The Respondent had not only failed to ensure that the Seller's condition for the exercise of the OTP to be on or after the agreed date in October 2017 was properly recorded in the OTP, but the Respondent also filled in the standard form OTP such that it had the opposite effect of requiring the OTP to be exercised on or before the agreed date. The DC opined that an ordinary person reading the OTP with care would have realised the error.

The Disciplinary Committee ("DC") imposed the following financial penalty and disciplinary order on the Respondent:

Charge 2: A financial penalty of \$ 2,000 and a suspension of 1 month.

Charge 3: A financial penalty of \$ 3,000 and a suspension of 2 months.

Fixed costs of \$ 2,000 was also imposed on the Respondent.