

S/N 13/2015 – Failing to Conduct Due Diligence in Checking Deadline for Exercise of the OTP and Failing to Give a Copy of the Offer to Purchase to Client

Facts of Case

The Respondent represented the buyer in the purchase of a private condominium (“**the Property**”). In July 2012, the buyer had engaged the Respondent’s wife, P, who was also the buyer’s sister, to find him a property to purchase.

P had arranged with the sellers’ salesperson, Q, to view the Property on 29 July 2012 (“**the 1st viewing**”). The buyer attended the 1st viewing and made an offer of \$1.18 million for the Property. This was communicated by P to Q via telephone. The offer was rejected by the sellers.

The buyer remained keen to purchase the Property, and engaged the Respondent in place of P to represent him in August 2012. As the Respondent was less experienced it was agreed that another salesperson, D would be involved in the purchase of the Property. It was not known to the buyer that D was the Respondent’s superior, and that the Respondent had to pay an overriding fee to D.

D then obtained the sellers’ contact number from P and contacted them on 8 August 2012. One of the sellers, B, informed D that the other seller, A, was away and gave him A’s contact number. On 14 August 2012, D contacted A and informed him that he had a potential buyer for the Property and requested a viewing on the same day (“**the 2nd viewing**”). D also expressed his interest in representing sellers in the transaction. A said that he would allow D to represent them and earn commission if the potential buyer purchased the Property.

The buyer, his wife, P and the Respondent attended the 2nd viewing. After the 2nd viewing, the buyer made an offer of \$1.25 million. The Respondent conveyed this offer to D who then informed A on the same night. A agreed to sell the Property at that price to the buyer.

On 14 August 2012 at about 10pm, the Respondent, P and D met the buyer at his workplace to sign an Offer to Purchase (“**the Offer Letter**”) that the Respondent had prepared. The Respondent and D had indicated that the option period was 14 days, the completion period was 8 weeks and that the sellers had until 16 August 2012 to accept the Offer Letter. Furthermore, the terms of the Offer Letter required an option, meaning an Option to Purchase, to be attached with it. The Respondent did not attach the Option to Purchase as he was unfamiliar with the terms, and also did not seek any clarification from D or P, but assumed that his understanding of option, being the Offer Letter itself, was accurate. The same clause also required the buyer to initial on the attached option, which was also not done.

When the buyer signed the Offer Letter, it was communicated to him by the Respondent and D that he had 14 days from the date of the Option to Purchase to

exercise the Option to Purchase. After signing the Offer Letter, the buyer handed the Offer Letter and a cheque for 1% of the purchase price (“**the Option Money**”) to D. The Respondent did not provide a copy of the Offer Letter to the buyer.

Upon receiving the signed Offer Letter, D prepared the Option to Purchase on his own. He mistakenly copied the Offer Expiry Date onto the Option to Purchase, such that the Option period was stated to expire on 16 August 2012 at 4pm instead of 29 August 2012 (14 days after the Option to Purchase had been issued).

On 15 August 2012 around 5pm, D met A to pass him the Option to Purchase, the Option Money and a non-exclusive estate agency agreement (“**the NEAA**”) dated 15 August 2012 appointing D as the sellers’ salesperson. The sellers signed the Option to Purchase as well as the NEAA. The signed documents were then passed to D on the same day.

On 16 August 2012 at around 3.30pm, D passed the signed Option to Purchase to the Respondent at their estate agent’s head office. At 4pm, the Respondent passed the signed Option to Purchase to the buyer. Although the Respondent purportedly went through the document with the buyer, he failed to notice that the deadline to exercise the Option to Purchase was 16 August 2012 at 4pm, much less alert the buyer to that fact or that the Option to Purchase had already lapsed by then.

As such, not knowing that the Option to Purchase had expired, the buyer met his banker to process the loan for the purchase of the Property. The banker was passed the Option to Purchase.

Sometime on 16 August 2012, the Respondent and D entered into a co-broking agreement to equally share the commission of 1% that D was collecting from the sellers. This was on top of the overriding fee that the Respondent had to pay D.

On 24 August 2012, the buyer’s banker informed him that there was an error in the deadline to exercise the Option to Purchase. The buyer was also informed by his solicitors that the Option to Purchase had expired and that the deadline to exercise the Option to Purchase should have been 29 August 2012, not 16 August 2012.

The buyer informed the Respondent and P about the error and they in turn contacted D, asking him to clarify with A. A was not contactable as he was travelling overseas.

On 26 August 2012, D told the buyer that the sellers were amenable to cancelling the transaction and refunding the Option Money. On 27 August 2012, the buyer lodged a caveat on the Property. On the same day, the sellers granted an option to purchase to another buyer who had offered \$1.27 million (“**the new option**”). The new option was to be exercised by 10 September 2012.

On 28 August 2012, the buyer, the Respondent and D approached B (as A was still overseas) to attempt to exercise the Option to Purchase. B refused.

On 29 August 2012, the Respondent and D presented a cheque from the sellers to the buyer refunding the Option Money in exchange for withdrawing the caveat. The buyer refused to accept the cheque as it was post-dated to 10 September 2012.

The new option was exercised by the new buyers on 7 September 2012.

As a result, the buyer and sellers were involved in a civil suit where the sellers sought to remove the caveat, and the buyer counter-claimed for specific performance of the Option to Purchase. On 26 April 2013, the Court ordered the caveat to be lifted and denied the buyer specific performance of the Option to Purchase. The buyer also had to pay costs to the sellers and did not receive a refund of the Option Money in the sum of \$12,500.

Charges

The Respondent faced the following 4 charges:

Charge 1

For failing to conduct his work with due diligence, despatch and care by failing to spot or alert his client to the error in the deadline to exercise the Option to Purchase (16 August 2012 instead of 29 August 2012) while he was going through the Option to Purchase with his client, thus jeopardizing his client's purchase of the Property and ultimately preventing his client from exercising the Option to Purchase in time, which resulted in the sale not proceeding altogether, in contravention of paragraph 5(1) of the Code of Ethics and Professional Client Care.

Charge 2

For performing estate agency work without the relevant knowledge by failing to be familiar with the procedure for property transactions and/or with the contents of the forms used, where he procured the signature of his client on an Offer Letter but did not at the same time attach an initialed Option to Purchase with the Offer Letter, as he failed to understand the meaning of "*option*" as indicated in clause 3 of the Offer Letter, in contravention of paragraph 4(1) read with paragraph 4(2)(d) of the Code of Ethics and Professional Client Care.

Charge 3

For failing to ensure that a copy of the Offer Letter was provided to his client, the buyer, immediately or as soon as possible after his client had signed it in his presence or at all, in contravention of paragraph 9(2)(b) of the Code of Ethics and Professional Client Care.

Charge 4

For continuing to act on behalf of his client, the buyer, where to do so would place his interests in potential conflict with those of his client, and without declaring in writing, or at all, the potential conflict of interest that the seller's salesperson was his colleague and superior in the same estate agent and would be collecting an overriding fee based on the co-broking commission to be paid by the seller's salesperson to him, in contravention of paragraph 13(1) read with paragraph 13(2)(a) of the Code of Ethics and Professional Client Care.

Outcome

The Respondent pleaded guilty to both Charges 1 and 3 with Charges 2 and 4 taken into consideration for sentencing, and the Disciplinary Committee imposed the following financial penalties and disciplinary orders on the Respondent:

Charge 1: A financial penalty of \$3,000 and a suspension of 22 weeks.

Charge 3: A financial penalty of \$1,000.

Fixed costs of \$1,000 was imposed on the Respondent.