Council for Estate Agencies

Note: This case was referred to a CEA Disciplinary Committee (DC) before the operationalisation of the Estate Agents (Amendment) Act 2020 on 30 July 2021. With the Act amendments, the maximum financial penalty for disciplinary breaches has been raised and a DC can impose a higher financial penalty on errant offenders.

S/N 1/2016 – Failure to Carry Out Work With Due Diligence and Care

Facts of Case

The vendor and owner of a commercial property ("**the Property**") had appointed the Respondent to sell the Property. The vendor authorised the Respondent to take instructions from his daughter. The vendor had purchased the Property which was under development at the purchase price of $594,200 under a Sale and Purchase Agreement ("**S&P Agreement**"). The purchase price was payable by instalments under a payment schedule listed in the S&P Agreement.

The Respondent was instructed to market 2 properties (the Property and another unit at the same development belonging to the vendor's daughter ("**the Unit**"). As instructed by the vendor's daughter, the Respondent advertised the Unit at $720,000 and the Property at $690,000 on a property website.

On 28 November 2013, the Respondent received an enquiry about the Property from a prospective buyer, A ("**A**"). The vendor's daughter then told the Respondent to show A the Property. On 29 November 2013 at about 3pm, the Respondent showed the Property to A and A's friend, B ("**B**"). A decided to buy the Property and signed an Offer to Purchase for $690,000 and handed over a 1% option fee cheque to the Respondent for the sum of $6,900, together with a request for early possession of the Property upon exercising the Option-to-Purchase ("**OTP**").

Later on the same day, the Respondent took the Offer to Purchase and an unsigned OTP to meet the vendor. Before the meeting, the vendor's daughter had asked the Respondent to check with her conveyancing lawyer ("**the lawyer**") if early possession was allowed, and to ask the lawyer who was liable for the undisbursed 10% of the price (i.e. $59,420) payable to the Developer ("**the final outstanding instalment**"). The Respondent tried to call the lawyer to clarify this, but was unable to get through to the lawyer by telephone. Because he could not reach the lawyer by telephone, the Respondent instead called and consulted another salesperson from his estate agent, who replied over the telephone that the buyer was liable for the final outstanding instalment, which would not be deducted from the sale price.

The Respondent then advised the vendor that the buyer will be liable to pay the final outstanding instalment and that it would not be deducted from the sale price of $690,000. Acting upon this advice, the vendor agreed to sell the Property for $690,000 to the respective spouses of A and B. The vendor signed the OTP which was prepared by the Respondent and accepted the cheque for the Option Fee of $6,900 from the Respondent.

While the Respondent did not get to speak to the lawyer, he had exchanged SMS messages with the lawyer on 29 November 2013. This exchange of SMS messages took place after the vendor had signed the OTP and had accepted the cheque for the Option Fee. It transpired that the Respondent had sent an SMS message to the lawyer

asking if the final outstanding instalment would form part of the selling price or if the buyer would be liable to pay for it on top of the selling price of $690,000. The lawyer had responded to the Respondent via SMS on the same day to inform that the final outstanding instalment would form part of the selling price.

As the Respondent remained unsure about who was to bear the final outstanding instalment, he had sent a further reply to the lawyer to ask who was liable to pay the final outstanding instalment.

The OTP was exercised on 4 December 2013.

On 11 December 2013, the lawyer called the Respondent for an urgent meeting on 12 December 2013 to enquire into the sale of the Property and told the Respondent that the selling price to be stated on the OTP should instead have been $690,000 + $59,420 = $749,420, to factor in the final outstanding instalment to be paid to the Developer.

The Respondent immediately called A to amend the OTP, but A refused and threatened to sue the vendor if the OTP was cancelled. As a result, the final outstanding instalment had to be borne by the vendor at completion, out of the $690,000 he received from the sale of the Property. The vendor had agreed to sell the Property at the price of $690,000 without factoring in the final outstanding instalment due to the Developer because of the Respondent's advice.

The Respondent had failed to conduct his work with due diligence and care by advising the vendor that the final outstanding instalment due to the Developer would be borne by the purchaser on top of the sale price of $690,000, when this was not the case as the amount was deducted from the sale price.

Charge

The Respondent faced the following charge:

> For failing to conduct his work with due diligence and care by advising his client (the vendor of the Property) that the final outstanding instalment due to the Developer would be borne by the purchaser on top of the sale price of $690,000, when this was not the case as the amount was borne by the vendor and deducted from the sale price, in contravention of paragraph 5(1) of the Code of Ethics and Professional Client Care.

Outcome

The Respondent pleaded guilty to the Charge and the Disciplinary Committee imposed the following financial penalty and disciplinary orders on the Respondent:

> **Charge**; A financial penalty of $2,500 and a suspension of 3 months.

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Fixed costs of $1,000 were also imposed on the Respondent.