

S/N 1 – Failure to Convey Expression of Interest, Declare a Potential Conflict of Interest and Misrepresentation

Facts of Case

The sellers engaged the Respondent on a non-exclusive basis to sell their property ('Property'). It was agreed that a commission of 1% of the selling price (exclusive of GST) would be payable by the clients in the event the Respondent effected a sale of the Property.

The Respondent marketed the property and assisted the sellers to sell the Property to the buyers at a price of \$1.68m.

At that time, the buyers had just sold their own house and the Respondent's partner salesperson had assisted the buyers in such sale. As a result of such sale, the Respondent's partner became entitled to a commission of \$46,000 which was payable by the buyers at the completion of the sale and purchase of the house. The Respondent was entitled to receive half of such commission (i.e. \$23,000 being half of \$46,000) by virtue of an agreement between him and his partner.

However, the Respondent did not declare to the sellers that he had an interest to receive such amount of \$23,000 (payable on completion of the sale and purchase of the buyers' house) before he assisted the sellers to issue the option to purchase, for the sale of the Property, to the buyers at the price of \$1.68m.

The Respondent requested the sellers to pay him commission of 2% of the price on the basis that he had sold the property above their anticipated or asking price of \$1.65m and further the buyers were allegedly represented by one Ms A (who in fact did not exist).

The sellers accepted \$1.68m was a good selling price but said they did not care about the amount of any co-broke commission which might be payable by the Respondent to Ms A. They thereby agreed to increase the commission payable to the Respondent from 1% to 1.25% of the agreed selling price.

Meanwhile, a third party who had expressed an interest to purchase the property allegedly made an offer, through his salesperson, to the Respondent to purchase the Property at a price of \$1.7m. The Respondent disputed that such an offer was made.

Charges

The Respondent was charged for the following offences:

Charge 1

For failing to protect his clients' interest in closing the sale of the Property to the buyers at the price of \$1.68m, and failing to inform the sellers of the

alleged higher offer of \$1.7m, in contravention of paragraph 6(1) read with paragraph 6(2)(a) of the Code of Ethics and Professional Client Care.

Charge 2

For failing to convey to his clients the alleged offer and expressions of interest of the third party, in contravention of paragraph 10 of the Code of Ethics and Professional Client Care.

Charge 3

For failing to declare to his clients his potential conflict of interest in receiving half the commission of his partner in selling the house of the buyers and continuing to assist his clients in selling the Property to the buyers, in contravention of paragraph 13(1) read with paragraph 13(2)(a) of the Code of Ethics and Professional Client Care.

Charge 4

For misrepresenting to his clients that the buyers were represented by Ms A in seeking to persuade them to increase his commission from 1% to 2% of the price, in contravention of paragraph 6(1) read with paragraph 6(2)(b) of the Code of Ethics and Professional Client Care.

Outcome

Following a trial, the DC considered with regard to Charge 1 that it was not proven that the third party had made an offer of \$1.7m for the Property. However, there was evidence that the third party had expressed an interest in the Property.

The DC concluded that Charge 1 was not established but held the Respondent to be guilty of Charges 2 and 3. The Respondent admitted he was liable for Charge 4. The Respondent was therefore convicted of Charges 2, 3 and 4.

The DC imposed the following penalties upon the Respondent:

- Charge 2: a financial penalty of \$7,000 and suspension of 7 months;
- Charge 3: a financial penalty of \$6,000 and suspension of 6 months; and
- Charge 4: a financial penalty of \$2,000 and suspension of 3 months.

The suspensions were ordered to run concurrently and fixed costs of \$1,000 were also imposed upon the Respondent.