

S/N 5/2016 – Rendering Wrong Advice to Client, Misrepresenting to Client the Market Practice in relation to Payment of Commission, Failing to Comply with the Council’s Policy and Other Misconduct

Facts of Case

The Respondent and her husband, who was also a registered salesperson, worked as a team to close property transactions.

One of their clients (the “**Client**”) had engaged the Respondent’s husband to help her buy a condominium unit (the “**Property**”) from the developer. The Option to Purchase of the Property was signed on 29 July 2010 and the Sale and Purchase Agreement was signed on 23 August 2010.

After collecting the keys to the Property sometime in early May 2011, the Client felt that the Property was too small and its location inconvenient. The Client therefore engaged the Respondent and her husband to help her sell the Property and also to lease the Property while searching for a purchaser. Thereafter, the Respondent and her husband worked together to look for a purchaser and a tenant for the Property as salespersons representing the Client.

On or around 13 May 2011, the Client met up with the Respondent and her husband. Upon the request of the Respondent and her husband, the Client signed an Exclusive Estate Agency Agreement (“**EEAA**”) for the Lease of Residential Property and an EEAA for the Sale of Residential Property in relation to the Client’s engagement of the Respondent and her husband as her salespersons. Both EEAs were dated 13 May 2011. Clause 6(a) of the EEAA for the Sale of Residential Property provided that commission would only be payable to the relevant estate agent at the time of the completion of the property transaction.

Sometime in June 2011, the eventual buyer of the Property (the “**Buyer**”) saw the advertisement for the sale of the Property put up by the Respondent and her husband. She contacted the Respondent and her husband and a meeting to view the Property was arranged for 17 June 2011. Both the Respondent and her husband attended the viewing on 17 June 2011 and showed the Buyer around the Property.

Shortly after the viewing, the Respondent and her husband spoke to the Client and asked the latter about the selling price of the Property. The Respondent and her husband subsequently told the Buyer that the Client was willing to sell the Property for \$1.1 million. The Buyer was agreeable to pay this price for the Property and made arrangements with the Respondent and her husband to meet the next day to sign the necessary documents.

The day after the viewing (on or around 18 June 2011), the Buyer met the Respondent and her husband. The Respondent and husband presented an Option to Purchase dated 8 June 2011 for the purchase of the Property at the price of \$1.1 million (the “**OTP**”). At the same time, the Respondent’s husband asked the Buyer to issue two cheques to pay the option fee under the OTP – one cheque was for \$31,460.00 and made payable to the Client, while the other cheque was a cash cheque for \$23,540.00 (the “**Cash Cheque**”). The Respondent’s husband indicated that the Cash Cheque was to be for the commission for both her husband and her.

Despite knowing that it was unusual for commission to be paid out to salespersons out of the option fee, the Respondent’s husband also advised the Buyer that it was market practice for commission to be paid out of the option fee. The Respondent confirmed this for the Buyer and she persuaded the Buyer to trust her and her husband in this regard. The Buyer was initially reluctant to issue the two cheques still until the Respondent and her husband showed the Buyer various cheques issued to them in other property transactions that they had handled. The Buyer then wrote out the two cheques in the manner explained to her by the Respondent and her husband.

Thereafter, the Respondent and her husband met up with the Client. At this meeting, the Client asked the Respondent and her husband whether she had to pay the seller’s stamp duty (“**SSD**”) on the proposed sale (taking into account the date on which she had purchased the Property). The Client further indicated that she could delay the sale of the Property until such time when the transaction would not attract SSD. The Client specifically asked the Respondent and her husband to ensure that she did not have to pay any SSD on her sale of the Property. In response, the Respondent and her husband advised the Client that the Option to Purchase for the Client’s purchase of the Property was dated 29 July 2010 and SSD would not be incurred if the sale of the Property to the Buyer took place one year after 29 July 2010. As the Client had left it to the Respondent and her husband to ensure that she did not need to pay SSD, the Client accepted their advice.

Further to their advice to the Client and in light of the Client’s wish to avoid paying SSD, the Respondent and her husband then prepared a second OTP dated 1 August 2011 for the Buyer’s purchase of the Property. This amended OTP was signed by the Client and the Buyer in the presence of the Respondent and her husband. The Client further agreed that the Buyer would collect the rental for the Property from 1 July 2011.

When the Client saw that two cheques had been issued by the Buyer in payment of the option fee, she asked the Respondent and her husband why this was the case. The Respondent and her husband then replied that one of the cheques was for their commission and that payment of commission out of the option fee was market practice, when in fact, this was not market practice at all.

The Client had asked the Respondent and her husband if she could pay the commission after the transaction was completed, but they told her that that was not possible. As such, the Client did not object to the Respondent and her husband collecting the Cash Cheque as their commission. On or around 20 July 2011, the Respondent and her husband banked in the Cash Cheque and this occurred before the completion of the transaction which took place on 30 October 2011. In fact, the Cash Cheque was banked in before the Buyer had exercised the amended OTP on 10 August 2011.

On 15 August 2011, the Client's lawyer advised her that she needed to pay SSD as she had sold the Property less than a year from her purchase of the Property on 23 August 2010. The lawyer further informed the Client that the relevant date for the purposes of avoiding having to pay SSD was the date of the Client's purchase of the Property (as reflected in the Sale and Purchase Agreement dated 23 August 2010) rather than the date of the Option to Purchase.

The Client therefore contacted the Buyer to request that the OTP dated 1 August 2011 be re-dated a second time and explained the situation to the Buyer. However, the Buyer was unable to accede to the Client's request as she had already paid stamp duty for her purchase of the Property. As a consequence, the Client paid SSD of \$27,600 on 19 August 2011. The Respondent and her husband paid the sum of \$18,040 as part-compensation to the Client.

On 30 October 2011, the Buyer's lawyers carried out the completion of the sale of the Property to the Buyer.

Charges

Accordingly, the Respondent faced the following five charges:

Charge 1

Wrongly advising the Client that seller's stamp duty could be avoided by dating the Option to Purchase for the sale of the Property one year after the date of the Client's option to purchase in her prior purchase of the Property, instead of the date of her Sale and Purchase Agreement, in contravention of paragraph 5(1) of the Code of Ethics and Professional Client Care.

Charge 2

Misrepresenting to the Buyer that it was market practice for commission to be paid out of the option fee, in contravention of paragraph 6(3) read with paragraph 6(4)(c) of the Code of Ethics and Professional Client Care.

Charge 3

Misrepresenting to the Client that it was market practice for commission to be paid out of the option fee, in contravention of paragraph 6(1) read with paragraph 6(2)(b) of the Code of Ethics and Professional Client Care.

Charge 4

Collecting commission from the Client from the option fee paid by the Buyer, contrary to CEA's policy that commission is to be collected at completion as indicated in Clause 6(a) of the prescribed EEAA for Sale of Residential Property, in contravention of paragraph 4(1) read with paragraph 4(2)(a) of the Code of Ethics and Professional Client Care.

Charge 5

Failing to act according to the instructions of the Client to avoid paying SSD when he advised the Client to re-date the OTP to 1 August 2011 as a result of which SSD amounting to \$27,600 was levied upon the Client, in contravention of paragraph 6(1) read with paragraph 6(2)(a) of the Code of Ethics and Professional Client Care.

Outcome

Pursuant to a plea bargain, the Respondent pleaded guilty to Charges 1, 3 and 4 and while Charges 2 and 5 were taken into consideration for sentencing purposes. 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 4.5 months;

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

Charge 4: A financial penalty of \$2,000 and a suspension of 3 months.

The suspension periods were ordered to run concurrently.

Fixed costs of \$1,000 were imposed on the Respondent and her husband (who also faced disciplinary action and the disciplinary proceedings were consolidated).