

# The Regulator April 2010

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## Council Message

Welcome to the April edition of the Regulator newsletter. Inside you will find information ranging from licensing, to education and case summaries. The Regulator serves an important role in responsible self-regulation, communicating important information and promoting greater transparency within RECA. I am pleased you are taking the time to read the current issue.

In this edition of the Regulator is another in the new series of Information Bulletins on mortgage broker relationships. This month we are showcasing, Personal Deals in Mortgages. There are now over 70 information bulletins available on the RECA website, and I encourage you to familiarize yourself with the range of topics available and use them whenever you have a need.

Also In this edition of the Regulator you will find an article detailing the process and importance of licence renewal, and I encourage all industry members to read it. The renewal period doesn't begin until mid-August, however planning ahead for a smooth renewal process benefits everyone.

April marks the halfway point in the licensing year, and behind the scenes at RECA, the initial work on renewals has already begun. Licensing and registration is what makes our industries credible and professional, and the annual renewal process is the biggest single event of the year at RECA. As of April 8, 2010, there were 11,877 real estate industry members in 1,083 brokerages, 2,601 mortgage industry members in 383 brokerages, and 728 real estate appraisal industry members, consisting of 283 candidates and 445 appraisers. That is 15,206 individuals and 1,466 brokerages that must be renewed every year.

Remember, if you feel there are important topics or changes happening in our industries right now, that you would like to see covered in the Regulator please let us know. RECA is always interested in feedback and comments from industry members. You can forward your comments to [communications@reca.ca](mailto:communications@reca.ca).

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## The Truth in Licensing

At the very foundation of self-regulation is the annual licence and registration renewal process. At RECA, the ground work for the 2010 renewal process has already begun. Behind the scenes we are preparing to renew 1,084 real estate brokerage registrations along with 11,909 real estate industry members, 393 mortgage brokerage registrations along with 2,595 mortgage industry members plus 728 appraisal industry authorizations.

A license to trade in real estate, deal in mortgages or conduct appraisals in Alberta must be registered and that registration expires each year on September 30<sup>th</sup>. The annual registration renewal process begins in mid-August and allows RECA to review and update all licensing information including business / corporate information about brokerages, personal and contact information for industry members as well as suitability for renewed registration.

Industry sectors we serve renew their registrations online and on behalf of the executive director and, throughout the year, store, maintain and update license information as changes take place. If this process were to have occurred during the past couple of weeks, let's say, on March 31<sup>st</sup>, there would have been a total of 16,699 Alberta license registration renewals in total. This is an enormous task. Each year, RECA looks forward to your diligent and timely participation in the process.

## **PRIOR TO RENEWAL**

To be eligible for registration renewal in 2010 both real estate and mortgage industry members must complete a mandatory relicensing education program. Appraisal industry members have no relicensing education requirement in 2010.

## **THE RENEWAL APPLICATION PROCESS**

Completing the renewal application is the cornerstone of the renewal process. Beginning in mid-August, your application can be printed by your broker for you to fill out and sign before meeting with your broker to complete the process.

In the real estate and mortgage industry sectors, the application consists of four distinct areas of focus.

The first distinct area asks for confirmation of legal identity and birth date. In recent years, the application has included an "also known as" or AKA option. The AKA must be a natural or obvious derivative of your legal name. If you are requesting an AKA for the first time, the application may proceed, but the AKA request must be approved and added to the personal profile by the RECA licensing department.

The second distinct area of the renewal application updates your contact information. You must confirm or update your personal residence information, contact phone number(s) and email address, all of which are mandatory fields. A correct email address is of particular importance, as this is the method by which RECA communicates important industry information to all industry members.

The third component of the application asks about information pertaining to your continued suitability for license registration. Through a series of six questions regarding professional discipline, legal judgments, bankruptcy and Criminal Code of Canada proceedings since the date of your last application, your suitability for practice is reaffirmed. All questions must be answered truthfully and completely and you must solemnly swear an affidavit in the presence of a Commissioner of Oaths / Notary Public / Solicitor that all information on the application is true.

If, by example, you have been disciplined by a professional body or if you have been convicted of a criminal offense since the date of your last application, then you must answer “yes” to the corresponding question or questions. Please note under the *Real Estate Act Rules* s.40, you are required to notify the executive director of events that cause a “yes” answer shortly after they occur. A “yes” answer to any of the questions does not necessarily indicate you are not suitable for license registration renewal. RECA simply needs to inquire further about particular circumstances surrounding the event. As a consequence, all “yes” answer applications (original form with supporting documentation) must be sent to RECA for processing.

The fourth section of the application is an acknowledgement that the broker has confirmed your identity and has discussed the six suitability questions with you and advised the consequences of swearing a false affidavit. As indicated on the application, “Any affidavit containing false or misleading information may result in the refusal of the application or suspension or cancellation of any authorization issued thereupon.” The broker can only sign this section and acknowledge your affiliation with the brokerage when the application including the sworn affidavit is complete.

The real estate appraiser / candidate renewal application contains different eligibility criteria questions but the personal identity, contact information and suitability areas are the same as the applications for real estate and mortgage industry members and the same renewal process applies.

## **WE ARE HERE TO HELP**

Requests for assistance regarding the renewal process become more frequent as September approaches. Establishing your renewal strategy early will improve your prospects for a successful outcome and uninterrupted license registration.

Some questions you might ask are ...

- Are eligibility requirements such as re-licensing education for some industry sectors complete?
- What is my / our strategy to ensure correct and timely completion of all elements of the application?
- Are there “yes” answers to any suitability question(s) that will require early completion of the application for submission to RECA?
- Is there a policy and procedure in place with which brokers, brokerage staff and industry members are familiar and have been trained to execute?
- Are you familiar with the resources available at RECA for assistance with extraordinary situations?

Preparing well in advance of September will ensure a successful renewal process. Please do not hesitate to email or call our information department if RECA can provide further assistance regarding renewals.

## Personal Mortgage Deals

**Summary: Mortgage brokerage industry members have a number of written disclosures that they must provide when they become involved in personal mortgage deals, either directly or indirectly. [See: *Real Estate Act Rules*, s.1(1)(h), s.41(f) and s.75]**

Avoiding conflicts of interest – and the appearance of conflicts of interest – is an important part of working as a mortgage brokerage industry member. There is nothing preventing mortgage brokerage industry members from becoming personally involved in mortgage deals, either directly or indirectly, though when doing so, they must ensure they provide the written disclosures required by section 75 of the *Real Estate Act Rules*.

### Conflict of interest

The *Real Estate Act Rules*, section 1(1)(h) define a conflict of interest as a real or apparent incompatibility between an industry member's interests and the interests of a client or potential client.

If a mortgage brokerage industry member, either directly or indirectly, deals in mortgages on their own behalf, he or she must make a number of disclosures in writing, either to the borrower, lender, vendor or purchaser of the mortgage, as the case may be. A mortgage industry member dealing in mortgages on his or her own behalf could be considered to be in a conflict of interest. If there is a complaint filed about the mortgage deal or the industry member's actions, how would a RECA hearing panel or a court of law view the conflict where the industry member has stated they are representing the best interests of the client at the same time as the individual industry member is directly or indirectly dealing in mortgages on their own behalf?

Providing the required disclosures is notice to the borrower, lender, vendor or purchaser of the mortgage as the case may be, that the industry member is dealing in mortgages on his or her own behalf and has a vested interest in how the deal proceeds. Please note this includes the brokerage as well as individuals registered with the brokerage. Should the other party to the deal not feel comfortable with the conflict that has arisen, he or she can choose not to proceed with the deal or seek independent advice.

### Written disclosures required

Pursuant to section 75 of the *Real Estate Act Rules*, an industry member dealing in mortgages on their own behalf must disclose the interest, either direct or indirect, that they have in the deal, that they are authorized pursuant to the *Real Estate Act* and the brokerage with which they are registered.

They must also disclose the complete details of any negotiations for a further disposition of the mortgage or the industry member's interest in it, and any information they have that could materially affect the acceptance, issuance, sale or purchase of the mortgage.

The above written disclosures must be provided at the earliest practical opportunity and as soon as the potential for conflict of interest arises.

### Example

A small developer is looking for a source of money for a small development and may have difficulty arranging financing through traditional sources, so the developer approaches a mortgage associate that he has regularly worked with in the past. The associate does not specialize in private lending and syndicated mortgages, however he refers the developer to an associate in another brokerage that specializes in private lending.

The developer needs \$500,000 of additional funding to develop the project and it is anticipated he will only need the money for a maximum of one year. The second mortgage associate contacts his regular investors and has some difficulty arranging the financing so he himself ends up becoming an investor in the syndicated mortgage. He will sell his interest in the mortgage as soon as possible and continues to search for another investor. Four investors participate equally in the mortgage.

The mortgage associate, through his brokerage and with a written service agreement, will administer the mortgage. The developer will pay the second associate's brokerage a \$15,000 fee for arranging the mortgage. The loan is at an annual rate of interest of 14%.

A number of conflicts of interest have arisen as a result of how this mortgage deal is structured. These conflicts include that: the industry member has invested in the mortgage; the mortgage associate's brokerage, through the mortgage associate, is acting on behalf of the investors (not the developer) in the syndicated mortgage; and, that the associate is attempting to dispose of his interest. The disclosures required of the mortgage associate to the borrower include: that the mortgage associate has a direct interest in the mortgage as one of the investors in the mortgage; that the industry member is attempting to dispose of his interest; that the brokerage is representing the investors in the deal and in the ongoing administration of the mortgage; that the developer is a customer of the brokerage; and, the name of the associate's brokerage. The associate needs to disclose to the investors that he is an investor and that he is disposing of his interest in the loan.

## FINTRAC Issues an Administrative Monetary Penalty

With the recent monetary penalty by The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) against Homelife Effect Realty Inc. of Hamilton, Ontario, it seems timely to reiterate the importance of industry member's obligations under the *Federal Governments, Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA). FINTRAC is an independent agency reporting to the Minister of Finance and is in no way related to the Real Estate Council of Alberta.

### FINTRAC issues an administrative monetary penalty against an entity

**Ottawa, March 3, 2010** – The Financial Transactions and Reports Analysis Centre of Canada has assessed an administrative monetary penalty against an entity. The penalty was imposed for violating the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA).

- Homelife Effect Realty Inc., engaged in the business of a real estate broker in Hamilton, Ontario, was issued a penalty of \$27,000 on 12 January 2010, for committing four violations:
  - Failure of a person or entity to appoint a person to be responsible for the implementation of a compliance program, in accordance with section 9.6(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and section 71(1)(a) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*.
  - Failure of a person or entity to develop and apply written compliance policies and procedures that are kept up to date and, in the case of an entity, are approved by a senior officer, in accordance with section 9.6(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and section 71(1)(b) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*.
  - Failure of a person or entity to assess and document the risk referred to in subsection 9.6(2) of the Act, taking into consideration prescribed factors, in accordance with section 9.6(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and section 71(1)(c) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*.
  - Failure of a person or entity that has employees, agents or other persons authorized to act on their behalf to develop and maintain a written ongoing compliance training program for those employees, agents or persons,

in accordance with section 9.6(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and section 71(1)(d) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*.

A number of business sectors in Canada are required to keep certain records, identify clients, maintain compliance regimes, and submit reports to FINTRAC consistent with their obligations under the PCMLTFA. These sectors include banking, life insurance, trusts, securities, real estate credit unions, casinos and money services businesses. Money services businesses also have the obligation to register their business with FINTRAC.

FINTRAC has had the authority to issue administrative monetary penalties in response to non-compliance with the PCMLTFA and related regulations since December 30, 2008. Penalties are used as a last recourse after other measures to ensure compliance with the law have been exhausted.

Administrative monetary penalties serve as an adjunct to existing criminal penalties. Both criminal and civil penalties cannot be issued against the same instances of non-compliance. Violations are classified as "Minor", "Serious" or "Very Serious", and carry maximum penalties of \$1,000, \$100,000 and \$500,000 respectively.

FINTRAC remains committed to working with reporting entities in ensuring compliance with the PCMLTFA and related regulations. The new penalties are a tool to encourage compliance.

FINTRAC is an independent federal government agency with a mandate to assist in the detection, deterrence and prevention of money laundering and the financing of terrorist activities. FINTRAC analyzes financial transaction reports and discloses financial intelligence to law enforcement and CSIS where it has reasonable grounds to suspect that the information would assist in the investigation of money laundering and terrorist activity financing offences or threats to the security of Canada.

FINTRAC is part of Canada's Anti-Money Laundering and Anti-Terrorist Activity Financing Initiative. The initiative is led by the Department of Finance and includes the RCMP, CSIS, Public Safety Canada, Canada Revenue Agency, Canada Border Services Agency, the Communications Security Establishment and the Department of Justice.

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## Licence Suspensions

### **Kassem Mohamad Jarrah - Real Estate Associate Licence Suspended**

*Calgary, Alberta* – On March 3, 2010, Kassem Mohamad Jarrah's licence to trade in real estate was suspended by an order of a hearing panel of the Real Estate Council of Alberta (RECA) for a period of six months. He was also ordered to pay a fine in the amount of \$5,000, costs in the amount of \$11,000 and complete educational requirements.

Mr. Jarrah was formerly registered as a real estate associate with Twin Oakes Real Estate 1993 Inc. o/a Re/Max House of Real Estate and is currently unregistered.

Mr. Jarrah acted contrary to the Code of Conduct and the *Real Estate Act* Rules (as they then were) in that he:

- failed to act fairly, honestly and with integrity with non-client [s.7(b) of the Code of Conduct];
- failed to inform his broker of activity [s.23(f) of the *Real Estate Act* Rules];
- failed to disclose his relation to a party in a transaction [s.3(d) of the Code of Conduct];
- failed to obtain consent to dual agency [s.3(c) of the Code of Conduct];
- failed to provide trade records to his broker [s.23(e) of the *Real Estate Act* Rules]; and,
- failed to provide competent service [s.6(c) of the Code of Conduct].

To review the Jarrah decision in its entirety, please click [here](#).

### **David Anthony Andrewsky - Real Estate Broker Authorization Suspended**

*Calgary, Alberta* – On February 24, 2010, pursuant to section 38(4.2) of the *Real Estate Act*, the executive director of the Real Estate Council of Alberta suspended the authorization of David Anthony Andrewsky, formerly registered as a real estate broker with Century 21 Country Real Estate (1995) Ltd. in Fairview, Alberta.

As a result of this suspension, David Anthony Andrewsky may not trade in real estate in Alberta at this time. The Real Estate Council of Alberta (RECA) is an independent, non-government agency, responsible for regulating real estate, mortgage broker, and real estate appraisal industry professionals under Alberta's *Real Estate Act*. RECA is mandated to protect consumers and to provide services that enhance and improve the industry and the business of industry members.

Pursuant to section 38 of the *Real Estate Act* Rules, the executive director of the Real Estate Council of Alberta suspended the licences of the following industry members:

**Sheron Susanne Vieira-Chawda, Mortgage Associate**  
**Kaleigh Samantha Young, Real Estate Associate**  
**Michael Glynn MacDonald, Real Estate Associate**  
**Brandon Arthur Vik, Real Estate Associate**

Should these industry members have complied with the term, condition or restriction previously applied to their licence by the executive director, they would become licensed.

## Case Summaries

### Letters of Reprimand

February – March 2010

7 Letters of Reprimand were issued:

- 1 breach of immediately notifying, in writing, the Executive Director when the industry member is the subject of any bankruptcy proceedings [s.40(1)(e) of the *Real Estate Act Rules*]
- 1 breach of immediately notifying, in writing, the Executive Director when proceedings pursuant to the criminal code are commenced against the industry member [s.40(1)(g) of the *Real Estate Act Rules*]
- 1 breach of immediately notifying, in writing the Executive Director when the industry member is convicted of any criminal offence or any other offence under the law of any country, province or state, excluding provincial or municipal highway traffic offences resulting in only monetary fines and/or demerit points [s.40(1)(h) of the *Real Estate Act Rules*]
- 1 breach of providing competent service [s.41(b) of the *Real Estate Act Rules*]
- 1 breach of fulfilling fiduciary obligations to clients [s.41(d) of the *Real Estate Act Rules*]
- 1 breach of industry members must practice in strict accordance with the Act, Regulation, Bylaws and any other laws that govern trading in real estate, mortgage transactions or appraisals in Alberta [s.41(g) of the *Real Estate Act Rules*]
- 1 breach of making representations or carrying on conduct that is reckless or intentional and that misleads or deceives any person or is likely to do so [s.42(a) of the *Real Estate Act Rules*]
- 1 breach of participating in fraudulent or unlawful activities in connection with the provision of services or in any dealings[s.42(b) of the *Real Estate Act Rules*]
- 1 breach of ensuring there is an adequate level of supervision for associate brokers or associates, as the case may be, within the brokerage and employees who perform duties on behalf of the brokerage [s.51(1)(e) of the *Real Estate Act Rules*]
- 1 breach of trading without appropriate authorization [s.17 (a) of the *Real Estate Act*]

### Audit Administrative Penalties

November 2009

#### Cornerstone Realty Inc. o/a Newstar Realty & Investments Calgary Branch

The brokerage failed to submit to the Real Estate Council of Alberta the required accounting documents not later than three months after the end of the brokerage's fiscal year. Breach of

s.91(4) of the *Real Estate Act* Rules.

\$1,500

*February 2010*

**1363997 Alberta Ltd. o/ Realty Executives Meridian**

The brokerage failed to submit to the Real Estate Council of Alberta the required accounting documents not later than three months after the end of the brokerage's fiscal year. Breach of s.91(4) of the *Real Estate Act* Rules.

\$1,500

**Administrative Penalties**

*March 2010*

**Cory Rowland**

Mortgage Associate with Pro-Link Mortgages Inc.

- Failed to disclose in writing to the parties to the deal in mortgages what steps, if any, had been taken by the brokerage to verify the information obtained or supplied by the brokerage to the parties [s.72(1) of the *Real Estate Act* Rules]
- Ms. Rowland processed and submitted a mortgage application but outside of documents that she subsequently provided in relation to the applicants income, did not advise in writing to the mortgage company what steps, if any, had been taken to verify the information contained in the mortgage application.
- \$1,500 Administrative Penalty

**Disciplinary Action**

*February 2010*

**Kassem Mohamed Jarrah**

Formerly an associate registered with Twin Oakes Real Estate 1993 Inc. o/a Re/Max House of Real Estate and currently unauthorized

Issues:

- Failed to act honestly and with integrity with a non-client [s.7(b) of the Code of Conduct]

- Traded in real estate on behalf of another person without first disclosing in writing to the parties to the trade that he was an industry member [s.28(a)(ii) of the Rules]
- Failed to keep broker informed of activities performed on behalf of the brokerage[s.23(f) of the Rules]
- Failed to disclose at the commencement of the negotiations that he was related to the buyer he was agent for [s.3(d) of the Code of Conduct]
- Failed to provide all documentation or trade records required to the broker [s.23(e) of the Rules]
- Made representation or carried on conduct that is reckless or intentional and that misleads or deceives any person or is likely to do so [s.4(d) of the Code of Conduct]
- Failed to obtain consent in writing to acting as a dual agent prior to entering into a real estate transaction [s.3(c) of the Code of Conduct]
- Failed to render a competent service including participating in the creation of a document he knew or ought to have known was not legally binding and confusing [s.6(c) of the Code of Conduct]
- Failed to cooperate fully with, and provide information requested to, any representative of the Real Estate Council of Alberta carrying out their responsibilities [s.7(d) of the Code of Conduct and s.38(4) of the *Real Estate Act*]

Facts:

- In December, 2003 and January, 2004, Mr. Jarrah met with a non-client on several occasions and discussed this non-client's plans to purchase, renovate and resell properties.
- As a result of these discussions, the non-client formed the belief that Mr. Jarrah was going to participate in his plan by providing financing or otherwise participate in the purchase of properties. This non-client proceeded to view and put an offer on a property.
- Mr. Jarrah in no way intended to involve himself however and failed to ensure that the non-client understood this.
- Having discussed with the non-client what he was doing with respect to this property, Mr. Jarrah obtained confidential information about the non-client's negotiation, purchase price and the terms of his contract. Mr. Jarrah proceeded to act for his son who made an offer on the same property. Mr. Jarrah did not disclose this to the non-client.
- As a result of the investigation and finding that Mr. Jarrah had acted on behalf of family members a number of times, it was found that on other transactions between 2003 and 2004, Mr. Jarrah failed to disclose that he was related to the buyer or seller, did not inform his broker of the activities he was performing on behalf of the brokerage and did not provide all documentation required, including

copies of offers and counter-offers and other information requested by the broker.

#### Results:

A Hearing Panel accepted an Admission of Conduct Deserving of Sanction from Kassem Jarrah. The Hearing Panel ordered that Mr. Jarrah's licence be suspended for a period of 6 months; that Mr. Jarrah pay a fine in the amount of \$5000, costs in the amount of \$11,000 and complete an educational requirement.

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## Education Corner

### **Taking M-REP Course Earns AMP Credits!**

RECA is pleased to announce that the Canadian Association of Accredited Mortgage Professionals (CAAMP) has awarded five (5) continuing education credits for the *Mortgage Broker Update 2009-2010* course. This is great news for those who hold the Accredited Mortgage Professional (AMP) designation.

### **Re-licensing Education (REP) update**

Here are the current statistics for the numbers of industry members who are taking, or have taken, *Real Estate Update 2009-2010* or *Mortgage Broker Update 2009-2010*. The following information will update you on the progress of course enrollments and completions as of April 7, 2010.

#### **Real Estate Update 2009-2010**

- There are 1,089 online completions plus 560 currently enrolled online, totaling 1,649.
- There are 1,093 classroom completions from 45 classes, averaging 24 students per class.
- Approximately 60% of classes were held by brokerages and 40% by associations/boards.
- All course completions, plus current online enrollments, total 2,742 industry members.
- This represents approximately 23% of individual real estate industry members.

#### **Mortgage Broker Update 2009-2010**

- We have 193 online completions, plus 302 in progress online, for a total of 495.
- This represents approximately 19% of individual mortgage broker industry members.

Your respective REP course must be completed prior to October 1, 2010, in order to fulfill the education requirement for licence renewal. Both online courses can be accessed through the RECA website ([www.reca.ca](http://www.reca.ca)) and taken at your convenience.

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## Legal Corner

The Plaintiff, Polaris Realty (1995) Ltd, initiated proceedings against the Defendant Sellers for payment of real estate commission. The Plaintiff, through their agent, Mr. P, completed a 3.1 million dollar purchase to Dunhill Developments Limited (Dunhill), a Defendant by Counterclaim, on behalf of the Defendants. Due to improper completion of the Commission Agreement portion of the final Offer to Purchase, real estate commissions were not paid.

The Buyers promptly resold the property and the Defendants, nine individuals on title, then sued in the amount of the increased purchase price paid in the subsequent transaction. The Defendants' counterclaim stated the agent acting for Polaris Realty, Mr. P breached his fiduciary duty. They also claimed breach of fiduciary duty against Mr. J of Dunhill & Dunhill Group buyers, alleging a failure to advise of a potential conflict of interest in their role as real estate agent and purchaser.

### Case Particulars

On August 5, 2003, the Defendants entered into a listing agreement with Mr. P as their real estate agent. The 107- acre parcel was listed at \$3,154,500.00, with a commission of two percent effective to December 31, 2003. All parties agreed to this and signed the Listing Agreement. Once listed, Mr. P notified potential interested buyers, resulting in a number of purchase offers submitted to the vendors.

Three specific offers were noted in this case, the most relevant being the \$2.5 million dollar offer by Dunhill Group or it's nominee in early November 2003. Upon Mr. P's presentation of the Dunhill offer, the Defendants advised him they were not pursuing any further offers due to some income tax or estate planning.

In the summer of 2004, one Defendant transferred a portion of her share to her three children – making nine total Defendants. From this point on, the children will be referred to as Junior Defendants, the adults as Senior Defendants. While this transaction was effected, Mr. J/Dunhill & Dunhill Group (the interested buyer) continued to contact Mr. P (the agent), who in turn contacted some of the Senior Defendants from time-to-time to check on property status.

A few days prior to July 13 2004, Mr. P contacted one of the Senior Defendants to follow-up on a possible property sale. Mr. P was told that a well-known real estate agent in the development market was interested in marketing the property, and that eight out of the nine Defendants had

signed a Listing Agreement in his favour. The Defendant advised Mr. P that he had a small time frame to bring forward any offers for purchase. Mr. P immediately called Mr. J and invited an offer, mentioning the time frame and that any offer should be close to listing price.

On July 13, 2004, Dunhill made a \$3 million dollar offer to purchase, with a December 31, 2004 closing date. This offer contained the usual due diligence clause for completion by August 31, 2004. The offer was presented on July 13 or 14 to seven of the nine prospective vendors. Two of the Junior Defendants were not present, but stated they would agree with the other Defendant's decision. A counteroffer was prepared for 3.1 million, containing an Agreement for Sale and amendments to the due diligence clause that, among other things, gave the vendor the right to farm the land until development. The offer was signed. The vendor's counter offer was accepted by Mr. J of Dunhill & Dunhill Group on July 14, 2004.

On October 4, 2004, the due diligence condition precedent was removed, creating a binding Offer to Purchase. By December 2004, the Defendants became aware that Southeast Ellerslie Land Co. Ltd. (Southeast) was the ultimate property purchaser once the transaction closed. Southeast is a syndicate of individuals or corporations organized by Mr. J /Dunhill to own and develop the parcel of land. On December 31, 2005, the nine Defendants signed the Agreement for Sale in the presence of a lawyer, for a total purchase price of \$3.1 million. Shortly after acceptance of the final offer, all parties became aware that Mr.J of Dunhill & Dunhill Group sold its interest in the Offer to Purchase to Southeast for \$3.627 million and that upon closing, Mr.J received a cheque for \$527,000.00.

## Issues

Once the plaintiff brokerage issued the Statement of Claim for payment of real estate commission, the Defendants brought forward a number of issues regarding the agent's conduct.

The Defendants alleged breaches of fiduciary duty in:

- the passing on of confidential information;
- failure to disclose all relevant facts;
- no referral for independent legal advice; and
- real estate agent did not obtain best purchase price.

As a result of the alleged breaches, the Defendants argued that the real estate agent forfeit his commission. They also sought damages against the real estate agent and the purchasers for the value of the increase purchase price from the sale of Dunhill to Southeast.

## Court Findings

### Commission

The listing agreement signed by the six original Defendants was effective until December 31, 2003. This document acknowledged a real estate commission of 2% payable upon completion

of transaction. Evidence presented confirmed ongoing discussions and negotiations between Mr. P and the Defendants regarding the amount of commission payable – between 2% and 3%. Based on this evidence, the court determined that although the document was completed incorrectly, it still set out the parties' intent to pay the real estate commission to Mr. P for the sale of the property and determined a 3% commission was owed to Mr.P.

#### Claim against Mr. J, Dunhill Group & Dunhill

In regards to the Defendants claim against Mr. J of Dunhill and Dunhill Group alleging failure in their duty to advise, no conflict of interest was found. Mr. J was not acting on behalf of the Defendants, therefore had no duty to the Defendants. Both offers submitted by Dunhill Group & Dunhill referred to a potential sale to a nominee. There was no evidence that Mr. J or Dunhill attempted to mislead or withhold information from the owners. Given that there was no legitimate claim by the Defendants against Mr.J, Dunhill Group or Dunhill for damages, the claim was dismissed.

#### Fiduciary Duty

##### Confidential Information

In this case, the Listing Agreement originally signed by the agent and Senior Defendants contained a disclosure acknowledgement statement saying:

“... the Seller's Agent owed you the fiduciary duties of undivided loyalty, obedience, confidentiality, reasonable care and skill, full disclosure, and full accounting.”

The Defendants allegations of improper use of confidential information were based on two conversations:

- When Mr. P told Mr. J there would be no counteroffer to his original offer of 2.5 million because the vendors intended to do some tax/estate planning
- When Mr. P advised Mr. J that the Defendants would accept a purchase price of \$3 million on the property during the final negotiations.

In previous case law, the judge stressed that agents are required to disclose information that could affect “the value of the property” or “the principal's decision”. Similar factors are relevant when considering whether disclosing information to a potential purchaser breaches an agent's duty to the vendor. There was no evidence that Mr. P disclosed any further details regarding the Defendants estate/tax planning or time delays. In this situation, the information about why no counteroffer was forthcoming and the new Listing Agreement did not affect the value of the property or the Defendant's decision. Given that Mr. J considered and accepted the counteroffer of 3.1 million, and that Mr. P encouraged an offer close to the original list price, but did not encourage his clients to accept Mr. J's offer blindly, indicated he acted in the best interests of

the Defendants. Since Mr. P did not tell Mr. J what purchase price the Defendants would accept he did not breach his duty to maintain confidential information.

### Full Disclosure

In the context of a fiduciary relationship the question in this case is whether Mr. P made full disclosure of all facts affecting the value of the property or principals' decision making. The Defendants alleged that Mr. P failed to:

- provide the purchaser's geographic location;
- disclose that he was a real estate agent; and
- provide the meaning of "or nominee" and "due diligence".

To establish that Mr. P failed to provide the above information, and as such breached his fiduciary duty, the Defendants had to establish their decisions and property value would have been affected if this information had been disclosed.

Witness evidence and documentation revealed that many attempts were made to establish a smooth transition from the Defendants farming the land to the eventual land development. It was clear the Defendants knew they were selling the land for development purposes and that some or all of the acres would be sold within time at a higher price. As well, the final accepted offer stated: "The shareholder of Dunhill Developments Limited is a licensed real estate broker". The judge found that the Defendants were told by Mr. P that Mr. J was a real estate agent/broker. Where Mr. J was located geographically and whether he was a "flipper" did not speak to the fundamental nature or character of the land transaction or final purchase price.

The phrase "or nominee" is a standard term in the business of land development. The judge took the position that the Defendants were aware of the phrases' meaning, and that future documents might not be in the name of the individual or corporation who signed the offer because the property was clearly in mind for development. It was found the Defendants understood the due diligence clause, given that they amended or adjusted the clause in every offer presented, in an effort to ensure their farming opportunities were protected.

### Independent Legal Advice

It was determined that Mr. P did not have a duty to refer the Defendants for legal advice. This could have been obtained at any time, given that the Defendants were in touch with lawyers throughout the negotiations and completion of the sale. Although the lawyers were not retained to deal directly with the offer, they were involved in a number of capacities, including processing the final documents required to close the transaction.

### Purchase Price

When determining whether the Defendant's received a fair purchase price it is useful to refer to the precedent setting case of *D'Atri v. Chilcott*:

- the price paid must be adequate;
- the transaction a righteous one;
- the price obtained must be as advantageous to the principal as the agent could obtain;  
and
- the onus is on the agent to prove that they complied with these duties.

Mr. P was unaware of the transfer or creation of the syndicate company that purchased the interest from Dunhill. Because the Defendants had the benefit of another real estate agent's opinion and signed a new listing agreement within days, it was plain they were well aware of the value of the land. The sellers would not have made the counteroffer, if the Listing Agreement price was significantly higher than the actual purchase price.

Based on this information, the judge found that the final purchase price Dunhill Developments and the Defendants decided on was a true and fair value. He also concluded that Mr. P carried out his fiduciary duty during the transaction by acting in the best interests of his clients. The Defendants' counterclaim for damages for the increased purchase price of the sale from Jones to Southeast was dismissed.

If you are interested in this case reference, please contact RECA Communications at:  
[communications@reca.ca](mailto:communications@reca.ca) .

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