

## Personal Deals and Transaction Brokerage

Can a real estate licensee be a principal in a real estate transaction and provide agency to the opposite party in the transaction through a Transaction Brokerage Agreement?

While many would think that the answer to this question is obviously no, we have seen a number of examples of licensees participating in just such an arrangement. Recently, the British Columbia Court of Appeal in *DeJesus v. Sharif* has clearly and unequivocally ruled that a licensee cannot offer agency to the opposite party in a transaction where the licensee is himself a principal in the same transaction.

This decision is consistent with the position of the Real Estate Council Alberta on this issue.

In the information bulletin, *Transaction Brokerage - Not Always Appropriate*, it is stated:

"A personal conflict can arise when industry members are in personal real estate trades. For example, an associate has ownership in a property listed for sale with the brokerage and the buyer client is represented by the same brokerage. Alternatively, the associate wants to buy a property listed by his or her own brokerage. The brokerage, through its industry members, is required to disclose these conflicts to their clients. It would be unrealistic for industry members to remain neutral under these circumstances."

In the *DeJesus* case, Mr. and Mrs. DeJesus purchased a property owned by Mr. Sharif, a licensee in B.C., in November, 2005 for \$895,000. Mr. Sharif acted as a Limited Dual Agent (the equivalent of Transaction Brokerage in Alberta) both for himself and Mr. and Mrs. DeJesus. Mr. Sharif had purchased the property in May, 2005 for \$423,000 and had only made minimal improvements to it when he sold it to the Plaintiffs for \$895,000 six months later.

The Court found that Mr. Sharif had breached his fiduciary duties to the Plaintiffs by not disclosing material information, in particular, the price that he purchased the property for in May, 2005 and the property's fair market value which was found to be \$760,000 at the time of the sale to the Plaintiffs. The Court concluded that Mr. Sharif owed Mr. and Mrs. DeJesus a fiduciary duty. The Court referred to the Supreme Court of Canada decision in *Guerin v. Canada* for the proposition that:

"It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty and categories of fiduciary like those of negligence, should not be considered closed."

The Court said that certain relationships are presumed to be fiduciary in nature and when such a presumption arises, the onus is on the Defendants to rebut the presumption. It recognized that there is a presumption in law that a real estate agent is a fiduciary and the onus is on the agent to rebut the presumption. The Court said:

"To rebut that presumption the Defendant must demonstrate that the relationship was not one of reliance, trust and confidence."

The Court then considered whether there were limitations imposed on Mr. Sharif's fiduciary obligations by the terms of the Limited Dual Agency Agreement (the equivalent of the Transaction Brokerage Agreement in Alberta). The Court said:

"In usual circumstances a Dual Agency Agreement is an agreement entered into when a real estate agent acts for both the vendor and the purchaser. In such circumstances, there are inherent conflicts of interest for the agent who is fixed with obligations to two principals. The Dual Agency Agreement limits such fiduciary obligations so such arrangements are possible."

While these agreements are common in British Columbia, the usual practice involves three people—two principals and an agent. In this case, however, there were only two people because the agent, Mr. Sharif, was also one of the principals.

This fact distinguishes this case from the normal circumstances of Limited Dual Agency Agreements. Rather than an agent owing duties to two principals, this case involved an agent owing obligations to Ms. DeJesus (and her husband) and to himself."

The Court held that a Limited Dual Agency Agreement is "inconsistent and incompatible" in these circumstances.

Clause 3A of a British Columbia Limited Dual Agency Agreement states:

"A. the Agent will deal with the Buyer/Tenant and the Seller/Landlord impartially;"

The equivalent clause in the Transaction Brokerage Agreement in Alberta is clause 1.1, which states:

"1.1 The brokerage will treat the interests of both the Buyer and the Seller in an even-handed, objective and impartial manner, including but not limited to, any advice or information given to one party will be disclosed to the other."

The Court stated:

“ ... the agent must act impartially between the two principals. Impartiality is possible in the usual situation involving three individuals.

However, I cannot see how an agent who is himself the Seller/Landlord could truly act impartially as between himself as the Buyer/Tenant. In my opinion, where the agent is also a principal the limitations in the Dual Agency Agreement are inapplicable and cannot be given effect. The fiduciary obligations of a real estate agent, and in particular one who is selling property to his principal, remain in place. ...”

The message is crystal clear. A licensee cannot provide agency to a party to a transaction in circumstances where the licensee is also a party to the transaction. To do so would place the licensee in an irreconcilable conflict.

**This article was partly reprinted from the Legal Update column by Greg Blanchard in the December 2010 edition of the Risk Report, published by the Real Estate Errors and Omissions Insurance Corporation.**

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## **New Appraiser Rules are in Effect**

Amendments to section 76 to 80 of the Real Estate Act Rules that took effect January 1, 2011 brought about changes to the Real Estate Appraisal standards. Specific details of the changes are listed below:

Amended Rules include:

- Appraisers will be unable to use standards for an appraiser organization for which he or she may not be in good standing.
- Appraisers will be required to maintain licensing records.
- Appraisers will be required to maintain or make available real estate appraisal records for review at the appraisers registered business office.
- Appraisers will be required to provide appraisal services in the name that appears on their license.
- Appraisers will be required to notify the executive director when they are no longer able to fulfill their responsibilities as an appraiser or when there has been a change in the business address.

The amended Rules also clarify some obligations, such as:

- Appraisers must not accept an appraisal assignment that is beyond their designation unless done in conjunction with a qualified appraiser.
- Appraisers must not accept an appraisal assignment or must refuse to provide

further appraisal services when the client's instructions contravene the applicable legislation, or when the client attempts to unduly influence the appraisal outcome or the appraisal is intended to be used for fraudulent or unlawful purposes.

- Before reviewing a candidate's appraisal report, appraisers must ensure that the candidate is authorized.
- Before providing an appraisal report for review by an appraiser, candidates must ensure that the appraiser to review the report is authorized and has the appropriate designation and qualifications to review the report.
- Appraisers must ensure that any employment arrangement or independent contractor terms do not conflict with the appraisers' requirement to keep records.

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## BITE SIZE RECA

In an effort to provide you timely information more often and in smaller chunks, RECA has made a number of communication changes. Case Summaries are now published on the first and third week of every month. The Regulator has been downsized to include two feature stories and smaller News Bites.

An ongoing Social Media initiative is under way that includes Twitter, Facebook & the upcoming RECA Blog. The Blog provides Industry Member's an opportunity to connect on a more personal level.

A recent Twitter poll of Industry Members regarding Blog topics provided the following list:

- Review sections of the act with Q&A posts
- Rules, Ethics and Case Study discussions
- Changes to the Act with relevant links & how that affects IM
- Significant dates or upcoming events
- A suggestion box for improvements to forms, rules etcetera
- Practice tips with a "for instance" component
- Best practice discussions

RECA is also moving into the V-log and online video stream, through the creation of Blog V-Logs and Print/Video combination consumer articles.

It's an exciting time for RECA communications. If you have any suggestions or comments regarding RECA communication please contact us at [communications@reca.ca](mailto:communications@reca.ca).

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## News Bytes

### **New Brokerage Amendments Procedure and Documents**

The Real Estate Act Rules require a brokerage to immediately notify the executive director in writing when certain aspects of the brokerage are amended, such as:

- A change of broker
- Trust account changes
- A change in the address of the registered business address
- The corporate or partnership structure has changed
- A change in contact information for the brokerage
- The brokerage name has changed

Recently, RECA has amended this notification process for brokerages. Please visit the link below for further information on this process and contact an Information Officer at [info@reca.ca](mailto:info@reca.ca) if you have any questions or comments about these changes.

### **Have questions for RECA ? Your Best Bet is Email**

Whenever you have a question for RECA-- whether in regards to licensing, legislation or anything at all--you will get the quickest response via email.

Our information officers receive nearly 14,000 phone calls and nearly 17,000 emails every year. Every call or email receives a call back within one business day; however many times a phone call can result in a game of phone tag. Posing your question in an email to [info@reca.ca](mailto:info@reca.ca) , or a licensing question to [licensing@reca.ca](mailto:licensing@reca.ca), will result in a quicker response and one you won't miss.

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## Council Members 2010-2011

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**Appointed from non-AREA industry members**

### **KEVIN CLARK**

**Appointed from residential real estate industry members**

### **CINDY DUBRAY**

**Appointed from the property management sector**

**GORDON GRAYDON**

**Appointed from the public**

**CONNIE LECLAIR**

**Appointed from the public**

**WAYNE MCALISTER, CHAIR-ELECT**

**Appointed from the Calgary Real Estate Board**

**KEN MCCOY**

**Appointed from the Edmonton Real Estate Board**

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**Appointed from boards outside of Calgary and Edmonton**

**RALPH SALOMONS, PAST CHAIR**

**Appointed from commercial real estate sector**

**CHERYL SCHINDEL**

**Appointed from boards outside of Calgary and Edmonton**

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**Appointed from the mortgage brokerage sector**

**ROBERT TELFORD, CHAIR**

**Appointed from the real estate appraisal sector**

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## **Contact RECA**

Case Summaries is published by the Real Estate Council of Alberta. Please forward your comments and suggestions to [communications@reca.ca](mailto:communications@reca.ca).

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