

**THE REAL ESTATE COUNCIL OF ALBERTA**

**IN THE MATTER OF** s. 39(1)(b) and s. 41 of the *Real Estate Act*,  
R.S.A. 2000, c. R-5, as amended

**AND IN THE MATTER OF** a Hearing concerning the conduct of  
Genseric Hoklee Fung, real estate associate registered with  
814355 Alberta Ltd. o/a Royal Lepage Summit Realty

Hearing Panel: Patrick Rudiger, Chair  
Andrew Huntley  
Wayne McAlister

Appearing: Gregory Sim on behalf of the Executive  
Director  
Genseric Fung on his own behalf

Witnesses: G. L.  
V. L.  
G. D.

Hearing Date: August 26, 2010

**A DECISION OF A HEARING PANEL OF THE REAL ESTATE  
COUNCIL OF ALBERTA ON CONDUCT**

I) INTRODUCTION

The Real Estate Council of Alberta held a hearing into the conduct of Genseric Hoklee Fung, real estate associate registered with 814355 Alberta Ltd. o/a Royal Lepage Summit Realty. The hearing panel members were Patrick Rudiger, Andrew Huntley and Wayne McAlister.

The hearing took place on Thursday, August 26, 2010. In appearance at the hearing were Drew Saly, counsel on behalf of the Executive Director and Genseric Fung on his own behalf.

II) ALLEGATIONS

Mr. Fung was called before a hearing panel to hear the following allegations set out in a Notice of Hearing:

1. **THAT** in or around the dates of April 18, 2006 to April 2, 2007, you traded in real estate on your own behalf and failed to disclose in writing to the parties to the trade any interest, direct or indirect, that you had in the real estate as a buyer contrary to section 28(a)(i) of the *Real Estate Act Rules* (as they then were, in force from October 1, 1999 to September 30, 2006) and section 62(1)(b) of the *Real Estate Act Rules* (in force as of

October 1, 2006). This conduct is conduct deserving of sanction, the particulars of which may include but are not limited to the following:

- a) B.L. and G.L. (hereinafter the "L.'s") were the owners of 818 – 112B Street, Edmonton, Alberta (hereinafter the "property").
- b) On or about April 13, 2006, the L.'s listed their property for sale with the [(the "Brokerage")]. V.L. was the real estate associate on behalf of the brokerage designated to act on the L.'s behalf in this listing.
- c) On or about April 18, 2006, you showed G.D. (hereinafter "G.D.") and N.Z. (hereinafter "N.Z.") the property.
- d) On this same date of April 18, 2006, you prepared an Offer to Purchase (hereinafter "OTP") on behalf of M.D. and M.A. and submitted it to the L.'s for the property.
- e) On this same date of April 18, 2006, the L.'s accepted the Offer to Purchase.
- f) The Offer to Purchase was subject to two Buyers' conditions, the first being a mortgage financing condition and the second being a property inspection condition.
- g) Soon after the REPC was entered into, you advised the L.'s that G.D. and N.Z. were having problems obtaining mortgage financing and that you may be taking over the REPC by having their interest as buyers in the REPC assigned to you.
- h) In response to this, G.L. advised you that he would not consent to this.
- i) On or about April 23, 2006, at 3:00 p.m. G.D. and N.Z. signed an assignment of their interest in the REPC to yourself.
- j) You did not disclose to the L.'s or to V.L. that the assignment was made.
- k) On April 23, 2006, you submitted a Notice to Purchase Contract to V.L. waiving both the mortgage financing condition and the property inspection condition. The Notice to Purchase Contract was also signed by G.D. and N.Z. as sellers at 3:00 p.m. on April 23, 2006.
- l) In January 2007, G.L. contacted you directly advising that he and his wife wanted to make good on the term in the REPC allowing them to extend the possession date by up to 3 months if necessary due to the construction of their new home. During this conversation, you advised G.L. that you were going to be taking over the REPC as the new buyer in place of G.D. and N.Z.. During this conversation, G.L. advised you that he was not prepared to consent to this.
- m) You failed to advise G.L., B.L. or V.L. that in fact on April 23, 2006, G.D. and N.Z. assigned their interest in the REPC as the purchaser to you.

2. **THAT** in or around the dates of April 18, 2006 to April 2, 2007, you made representations or carried on conduct that was reckless or intentional and that misled any person or was likely to do so, contrary to section 4 of the *Code of Conduct* (as it then was, in force from October 1, 1999 to September 30, 2006) made pursuant to the *Real Estate Act*, and contrary to section 42(a) of the *Real Estate Act Rules*. This conduct is conduct deserving of sanction, the particulars of which were set out in paragraph 1).
3. THAT in or around the date of January 2007, you discouraged a party to a trade in real estate from seeking expert advice contrary to section 42(d) of the *Real Estate Act Rules* made pursuant to the *Real Estate Act*. This conduct is conduct deserving of sanction, the particulars of which may include but are not limited to the following:
  - a) On January 2007, G.L. contacted you about changing the possession date on the REPC. During this conversation you advised him that you wanted to amend the REPC to input yourself as the purchaser. G.L. advised you that he

- was not prepared to agree to this and that he wanted to discuss this issue with his lawyer.
- b) Your response to G.L. was that if he was not prepared to agree to the change that you would not agree to extending the possession date
  - c) You did not deal with the issue of the assignment through V.L., the designated real estate associate acting on behalf of the L.'s in this transaction.
4. THAT in or around the date of January 2007, you engaged in conduct that undermines public confidence in the industry, harms the integrity of the industry, or brings the industry into disrepute by dealing with a change you wanted to make to the REPC entered into between the L.'s and G.D. and N.Z. directly with G.L. when you were aware or ought to have been aware that the L.'s were being represented by V.L. in respect of this real estate transaction, contrary to section 42(g) of the Real Estate Act Rules. This conduct is conduct deserving of sanction, the particulars of which may include but are not limited to the following:
- a) You asked G.D. and N.Z. to assign their interest in the property to you. You did not wish to have their REPC lapse and then you write a new Offer to Purchase for the property because the market at the time was a seller's market and you did not want to have your offer in a multiple offer situation.
  - b) On or about April 23, 2006, G.D. and N.Z. executed an assignment of their interest as purchasers of the property to you. You did not make the L.'s or V.L. aware of this assignment.
  - c) In or around January 2007, G.L. contacted you about extending the possession date for the REPC. You in turn advised him that your clients were intending to assign their interest in the REPC to you. You did not address the issue of the assignment through V.L.
  - d) On or about January 24, 2007, you attended at the L.'s residence and brought a Notice to the Purchase Contract amendment form seeking to both extend the possession date as per the L.'s request and to change the purchaser on the REPC from G.D. and N.Z. to yourself, Genseric Fung and/or nominee. You again did not address this matter directly through V.L., the L.'s agent.
  - e) When you attended at the L.'s residence, the L.'s advised you that they wished you to send the form to their lawyer. You in turn advised them that you would reverse your decision on the extension to the possession date if they did not agree to the change in purchaser.
  - f) You never advised the L'ss that on April 23, 2006, G.D. and N.Z. assigned their interest in the REPC to yourself

### III) EVIDENCE

Counsel on behalf of the Executive Director called three witnesses. The Notice of Hearing was entered as exhibit 1. Counsel informed the panel that the Notice of Hearing contained an error in numbering. Counts 5 – 19 should be under Count 4 a – f. The Notice of Hearing has been correctly numbered in this decision.

G.L. identified the complaint that he and his wife made to RECA, entered as exhibit 2. G.L. testified that he and his wife listed their house for sale and that V.L., G.L.'s mother and authorized real estate associate, acted as the L.'s agent. Mr. Fung did not make an appointment to view the house but showed up with his clients. The L.'s allowed them to view the house and an offer to purchase for the full asking amount was made and accepted when Mr. Fung returned later the same evening. V.L. was not available on the evening Mr. Fung arrived with the buyers, but G.L. contacted her by telephone when Mr. Fung presented his offer. G.L. testified that there were other agents waiting to show the house while Mr. Fung was making the offer; Mr. Fung's clients were willing to pay the full price and he understood from Mr. Fung that because of that, they could not ask any more than the listing price. After the L.'s signed the offer they had mixed feelings; happy to have sold their house but concerned about the buyers who did not appear to be very interested in the property. G.L. explained that the possession date was one year in the future with the condition that the new purchaser be willing to give them a 3 month extension if requested. He and his wife were building a new house and were concerned it might not be finished by the possession date. G.L. recalled that there were also some buyer financing conditions. A few days after the L.'s signed the offer to purchase, Mr. Fung called G.L. to tell him his clients were having some difficulty getting financing. The L.'s were okay with that information as it meant they could get out of the contract if the financing did not go through. However, the buyers' conditions were waived and the property was sold. G.L. spoke to Mr. Fung a few times after the sale and saw nothing wrong with that. He does not remember if Mr. Fung ever told him he should be speaking with the L.'s agent and not directly to G.L. himself. In the end, G.L. assumed the buyers were G.D. and N.Z. At some point, the L.'s invoked the extension condition. G.L. stated that Mr. Fung called him around 9 pm one evening and said he was coming over to have his name put on the contract. G.L. asked him not to come over but to fax the document to him so that he could have his lawyer look at it. G.L. testified that it was at this point that Mr. Fung threatened to revoke the extension permission. G.L. did not know if Mr. Fung spoke to V.L. about the assignment, but G.L. called her that night to ask her about the amendment form – identified and marked as exhibit 5. G.L. never signed a form agreeing to Mr. Fung as the buyer and did not know before the possession date that Mr. Fung had an agreement in place that he was a purchaser either directly or indirectly. Upon cross examination, G.L. admitted that he and his wife were excited about selling their house but were worried they had undervalued it. G.L. admitted he had given Mr. Fung his cell phone number but did not recall if Mr. Fung had informed him that he should speak to the L.'s agent instead of directly with him. G.L. informed the panel that he called his agent when Mr. Fung made the offer and asked her about the protocol and she advised him how to fill out the form. At no time did G.L. pass the phone to Mr. Fung to speak to his agent. V.L. did not mention that someone else from her brokerage could be there. When asked if G.L. would have gone ahead with the deal if he had not been given the green light by his agent, he replied that they had achieved their goal by selling the house for their full asking price, but they felt obliged to sell. They felt that they might lose the sale if they waited.

V.L. testified that her normal trading practices in taking a client to view a property would be to call the listing agent or the seller, depending upon what was set up with the listing. She explained that a client's phone number does not show up on the listing anywhere. V.L. identified the MLS listing for G.L.'s property – marked as exhibit 7. She recalled getting a phone call from G.L. telling her that Mr. Fung was at the house and wanted to look around. She could not recall what she said but told the panel that she would have told her son to go ahead and let Mr. Fung view the house if her son felt comfortable. She cannot recall if she indicated it would be better if they waited until she had returned. V.L. admitted there was a lot of paperwork that she did not initially have to hand into her brokerage because she was not present when the offer

to purchase was made and she had to get the documents after the fact. V.L. believed the purchasers of the L.'s property to be G.D. and N.Z. V.L. did not know before she handed over the keys to Mr. Fung that he been assigned as purchaser of the property. On cross examination, V.L. could not remember if she gave Mr. Fung her son's phone number but admitted she may have. She was also aware of the discussions that took place between G.L. and Mr. Fung. V.L. testified that she did try to get in touch with Mr. Fung but could not accurately remember how many times she spoke to him nor could she remember if Mr. Fung has suggested to her that she have another person from her office present at the offer.

G.D. testified that he worked with Mr. Fung to purchase a home and identified his signature on the second page of the Offer to Purchase – exhibit 8. After consulting with a financial manager, he and his wife decided not buy the house and informed Mr. Fung who said he would be interested in buying the house. G.D. entered into an agreement to transfer his interest in the property to Mr. Fung. G.D. testified that he signed the Notice to Purchase, exhibit 4, document where the conditions were waived and the amendment to the real estate purchase contract where it listed a new buyer, Mr. Fung. When asked if he remembered why Mr. Fung wanted him to sign the amendment, G.D. said he could not remember. G.D. stated that he signed the Transfer of Land document, exhibit 9, with his lawyer. Upon cross examination, G.D. testified that he met Mr. Fung at an open house and had never met him before and it was his and his wife's decision to purchase the house. G.D. stated that he did not make any money on the house after it was assigned to Mr. Fung and after he and his wife signed the amendment to the purchase contract at the lawyer's office, they never saw Mr. Fung again. G.D. could not recall if Mr. Fung told him that if they changed their mind he would sell the house back to them. When asked about the money for the down payment, G.D. stated that it came from him and his wife and he later got it back from Mr. Fung.

Mr. Fung testified on his own behalf. He stated that the buyers were in the house longer than the 2 or 3 minutes claimed by G.L. and that they in fact viewed the house twice. He was frustrated with not dealing with the L.'s agent. When the Residential Real Estate Purchase Contract was completed his name did not appear as a buyer. Mr. Fung stated that if he were interested in the property he would have added 'or nominee' to the Buyers names from the beginning. It was only after the Buyers realized that they could not meet the financial conditions that he became involved. Under cross examination, Mr. Fung testified that he prepared the Notice to Purchase contract, exhibit 4, and faxed it to V.L. as he knew V.L. was the agent for the sellers. Mr. Fung did not recall telephoning G.L. on the evening in question and did not believe he would go over to someone's house at 9:00 pm especially when there were small children at home as testified by G.L. and V.L.. Mr. Fung stated that G.L. often called him after the offer was presented and that he called V.L. to get permission to see the house. V.L. told Mr. Fung to go ahead with the offer even though he said he told her he wanted a third person there. As he was acting on behalf of the buyers, he could negotiate better without a seller's representative present, but he strongly disagreed that it should be done that way.

#### IV) SUBMISSIONS

With regards to count 1, counsel on behalf of the Executive Director submitted that the evidence clearly showed that at no time did Mr. Fung disclose that he had taken an interest in the property. The words 'and/or nominee' did not indicate the he signed a deal and was the real buyer. Neither G.L. nor V.L. knew he was the real buyer until after the deal closed. G.L. thought he had to agree that Mr. Fung would be an assignee and he did not agree so he never knew that Mr. Fung has been assigned. The Executive Director has no issue with Mr. Fung's

assertions that he sought advice regarding the assignment and the assignment was legal. The issue was the failure to disclose the assignment. With regards to count 2, Mr. Fung clearly misled the sellers as he sent the contract and waiver of conditions to them but not the assignment which was signed at the same meeting as the notice of waiver. Both G.L. and V.L. believed that G.D. and N.Z. were the buyers. With regards to count 3, when Mr. Fung and G.L. had a discussion about amending the contract, G.L. felt dissuaded from seeking professional advice when he was asked to sign the assignment. With regards to count 4, Mr. Fung approached G.L. on more than one occasion to discuss the amendment when he should have been discussing it with, V.L.. Mr. Fung had an obligation to deal with the sellers' agent if there was one. He should have approached V.L. about the assignment and he failed to do so.

Mr. Fung submitted that he was the only one hurt in this matter which happened 4 years ago. Mr. Fung further submitted that although V.L. could recall what happened between her and her son 4 years ago she could not recall any conversations with him. V.L. did not remember that he asked her to bring another agent into the offer and she never returned his calls. Mr. Fung submitted he told the L.'s he has been assigned to the property when the conditions were removed in 2006. G.L. called him many times directly after the sale and when he wanted to extend the possession date. Mr. Fung submitted that he sent everything to V.L. and only the presentation of the offer was done directly.

## V) FINDINGS

The Panel finds conduct deserving of sanction on counts 1 and 2 but no conduct deserving of sanction on counts 3 and 4 for the following reasons:

### Count 1 and Count 2

Mr. Fung failed to inform the sellers in this transaction that he has been assigned as the buyer of the property. The evidence supports this finding. The conditions were waived on April 23, 2006 and at the same meeting the property was assigned to Mr. Fung. Only the waiver of the conditions was sent to the sellers, not the assignment. Mr. Fung told G.L. that he intended to be assigned, not that he had been assigned. Mr. Fung had only to write a letter to V.L. informing her that he had been assigned as the buyer for the property.

### Count 3

The Panel did not find sufficient evidence to support this count. Other than verbal testimony, there was no evidence to support G.L.'s claim that Mr. Fung threatened to withdraw the possession extension date if G.L. did not agree to the assignment. G.L. stated that Mr. Fung telephoned him on an evening in January 2007 and asked to come over to have him sign the assignment document. G.L. testified that he was packing to go away the next day and so was insistent that Mr. Fung fax over the document so that he could show it to his lawyers. G.L. recalled calling his wife the next day and asking her if the fax had arrived. V.L. stated that her son told her Mr. Fung has come to the door but she didn't know if her son was home or just his wife and daughters. Mr. Fung testified that he did not go over to the L.'s house. The evidence contained conflicting verbal testimony and the Panel was not inclined to believe one witness over the other.

### Count 4

The Panel believes that Mr. Fung should have made more effort to contact G.L.'s agent during the course of the transaction, but does not find him reckless in his behavior. Nor does the Panel

find that Mr. Fung brought the industry into disrepute by dealing with the seller directly in this case. V.L. gave Mr. Fung her son's cell number when he first contacted her and she told him to call. G.L. told Mr. Fung to call him whenever he wanted and initiated telephone calls to Mr. Fung, in particular when he wanted to invoke the term of the extension date.

## VI) ORDERS

Having found that Mr. Fung has undertaken conduct deserving of sanction in two of the four counts, the Hearing Panel invites the parties to supply written submissions on the issue of sanction and costs of the Hearing as follows:

- Counsel on behalf of the executive director will have 14 days from service of this decision to provide any written submissions he has regarding sanction and costs. Any such submission shall be delivered to both the Hearings Coordinator and to Mr. Fung within the 14 day deadline.
- Mr. Fung shall provide any written submissions he may have regarding sanction and costs within 14 days of receiving the executive director's submission. Any such submission shall be delivered the Hearings Coordinator within the 14 day deadline.
- The Executive Director will have an opportunity to make a rebuttal on Mr. Fung's submissions, if he so chooses.

This decision was made on 14<sup>th</sup> September, 2010

*Pat Rudiger, Chair*

*Andrew Huntley*

*Wayne McAlister*

**IN THE MATTER OF** s. 39(1)(b) and s. 41 of the *Real Estate Act*, R.S.A. 2000, c. R-5, as amended

**AND IN THE MATTER OF** a Hearing concerning the conduct of Genseric Hoklee Fung, real estate associate registered with 814355 Alberta Ltd. o/a Royal Lepage Summit Realty

**A HEARING PANEL OF THE REAL ESTATE COUNCIL OF ALBERTA**  
**DECISION ON SANCTION**

**I) INTRODUCTION**

The members of this Hearing Panel are Patrick Rudiger (Chair), Andrew Huntley and Wayne McAlister. The Hearing into this matter took place on August 26, 2010. The Hearing Panel issued a written decision on their findings in respect to the Executive Director's allegations of conduct deserving of sanction in this matter on September 4, 2010. The Panel found conduct deserving on two of four allegations. Following the issuance of that decision, the Panel requested submissions on sanction from counsel on behalf of the Executive Director of the Real Estate Council of Alberta, and Mr. Fung. The Panel met on October 7, 2010 to make their decision on sanction.

**II) SUBMISSIONS ON SANCTION**

*Executive Director*

Counsel on behalf of the Executive Director submitted that appropriate sanction in this matter would be a fine of \$4,000; successful completion of the Ethical Practice in Real Estate course and payment of all or some portion of the hearing costs of \$9,863.83 as outlined in the Schedule of Hearing Costs which was presented to the Panel. Counsel submitted four previous cases for the Panel to consider those being Birch, Ling, Marriott and Sartori.

Mr. Fung was acting on behalf of the buyers and although he did conduct a significant amount of dealings with the buyers directly he was not acting in a true dual agency capacity. Mr. Fung concealed the fact that the buyers had assigned their interest to him when he sent the waiver of conditions to the sellers without disclosing his interest in the property. This misled both the sellers and their agent.

*Written Submissions of the Member*

Mr. Fung submitted that he had been licensed less than three years when this transaction took place and had no experience with the type of rapidly changing market that occurred in 2006 and 2007. The sellers received the full asking price for their home and did not suffer any financial loss at the time. If they had waited and sold in 2007 they would have been able to ask a higher price. Mr. Fung submitted that he was willing to attend training.

## II) ORDERS AND REASON

The Hearing Panel orders Genseric Fung:

- a) to pay a fine in the amount of \$4,000.00.
- b) to successfully complete the Ethical Practice in Real Estate course within 6 months of the date of this decision.

Should this course not be available within the time frame, a different course may be substituted at the sole discretion of the Executive Director or the Executive Director may extend the deadline for the completion of the course. It is Mr. Fung's responsibility to advise the Executive Director if this course is not available or to advise the Executive Director when he has successfully completed the course.

- c) to pay costs in the amount of \$3,200.00

The Panel believes a fine of \$4000 is appropriate. The counsel for the Executive Director asked the panel to review the decisions in the matters of Bruce Marriot; Moses Ling, Cherie Ann Birch and Giampiero Sartori. In the Marriott case, the fine was \$3000 as Marriott failed to fully disclose to his client the true nature of his relationship or the services he would be performing which is somewhat similar to Mr. Fung's failure to disclose the true nature of his involvement in the transaction. In Ling, the fine was \$4000 for attempting to purchase the assets of a business and failing to disclose his direct or indirect interest in the transaction. Birch was fined \$4000 for the same type of breach that failing to disclose to parties her interest in a transaction and industry membership. The panel did not believe that the Sartori matter was as relevant when compared with the Fung matter.

The Panel believes Mr. Fung would benefit from further education and the Ethical Practice in Real Estate course would be an appropriate course.

Taking into account the length of time it has taken for this matter to come to hearing and that Mr. Fung successfully demonstrated two of four counts brought against him by the Executive Director did not constitute conduct deserving of sanction, the Panel believes costs in the amount of \$3200 would be appropriate

This Decision was made on 13<sup>th</sup> October, 2010

*Patrick Rudiger, Chair*

*Andrew Huntley*

*Wayne McAlister*