

IN THE MATTER OF
THE REAL ESTATE ACT, C. R-1.3
AND
IN THE MATTER OF DWAYNE KOK

DECISION OF THE
SASKATCHEWAN REAL ESTATE COMMISSION

Commission File: #2007-63

Before: A Saskatchewan Real Estate Commission Hearing Committee
comprised of the following persons:
Randal C. Touet - Chairperson
Donnett Elder
Phillip Mack
John Puderak

Appearances: Ed Miller, on behalf of the Investigation Committee
Dwayne Kok, Registrant

Hearing Date: May 9, 2008
Saskatoon, Saskatchewan

Written Decision: June 10, 2008

The Formal Hearing was held May 9, 2008 at the offices of the Saskatchewan Real Estate Commission 237 Robin Crescent, Saskatoon, Saskatchewan before a hearing committee (The Committee) of the Commission.

CHARGES

The registrant was charged with professional misconduct contrary to Section: 39(1)(c) of *The Real Estate Act* in that he breached Bylaw 730(f) by personally writing a Residential Contract of Purchase and Sale form on June 11, 2007 and did not prepare or deliver a mandatory written Statement of Disclosure to the Sellers before presenting his offer.

LEGISLATION

Clause 39(1) (c) of the Act states:

“Professional misconduct is a question of fact, but any matter, conduct or thing, whether or not disgraceful or dishonourable, is professional misconduct within the meaning of this Act, if it is a breach of this Act, the regulations or the bylaws or any terms or restrictions to which the registration is subject.”

Commission Bylaw 730(f) states: “The following approved forms, provided by the Association of Saskatchewan REALTORS® shall be mandatory: (f) Statement of Disclosure.”

FACTS

- a) Dwayne Kok has been a registrant as a salesperson since July 17, 1996. He is currently registered with Century 21 Conexus Realty Ltd. in Saskatoon and was so registered at the time of the matters alleged herein. The Hearing Committee heard from four witnesses during the course of the hearing: the registrant, the broker for the registrant, the prospective seller of the property and a registrant who represented the prospective sellers. In addition, there was an exhibit book the contents of which were accepted as full exhibits with the exception of Exhibit C(1) being a letter from the complainant, Exhibit D(2) being a letter from the registrant acting for the seller and E(2) being the response from Mr. Kok. These documents were accepted for identification only.
- b) The Seller (Complainant) was the first witness. She indicated she had purchased the property in question, a 12 suite apartment block, approximately 6 years ago. In 2007 there were changes to her personal life and the property she was holding in a corporate entity in Saskatoon, Saskatchewan was to be sold. She felt it was a good market and a good time to sell the building. On about June 11, 2007 the Residential Contract of a Purchase and Sale offer was prepared by Dwayne Kok on behalf of himself, his spouse and another couple. They were offering to purchase, from the Complainant's corporation, the apartment block in question. The evidence indicated that on the Residential Contract of Purchase and Sale, Dwayne Kok appeared as salesperson and one of four named buyers of the property.

- c) The Complainant and her spouse had never met Mr. Dwayne Kok. The only information she had concerning him was through her real estate agent. She had reviewed the offer and the conditions and had received other offers, including one \$10,000 higher than the offer received from Mr. Kok. The offer to purchase was never completed as conditions set forth therein were never met nor waived. The complainant acknowledged that she was aware that Mr. Kok was in real estate at the time of seeing the residential contract of purchase and sale based on her reading of the document.
- d) The real estate agent acting for the Complainant's corporation said that he was contacted by the Sellers and he had received multiple offers for the property. The offers were all presented on June 12, 2007 and he had received an offer from the registrant Dwayne Kok. At the home of the Complainants, the offers were all opened at the same time. He advised the Complainants that the offer from Mr. Kok was a good offer and told them that Mr. Kok was a REALTOR. The conditions on the Residential Contract of Purchase and Sale were as follows:
- i) The buyer obtaining approval of a mortgage on the above property in the amount set forth in paragraph 1.2 (c) on /before the 12th day of July 2007.
 - ii) Subject to the buyer receiving and accepting a phase 1 environmental report by July 12, 2007.
 - iii) Subject to the roof, mechanical and building inspection by July 12, 2007.
 - iv) Deposit to be increased to \$100,000 upon the removal of conditions.
- e) The Seller accepted the offer because the Corporation's representative felt it was the best one put forward. The conditions were to meet by July 12, 2007. From the time of the acceptance of the offer until July 10, 2008 the agent for the Seller had no contact with Dwayne Kok. At that time, Mr. Kok contacted the real estate agent for the sellers and advised that he could not obtain mortgage financing and said that he needed a price reduction. This did not occur and the transaction did not close.
- f) The real estate agent for the Seller indicated that he had never received a Statement of Disclosure form in his office. He agreed however that Mr. Kok, on June 12, 2007, said that Mr. Kok had forgotten the Statement of Disclosure form and would get back to him. The Seller's real estate agent said this form was never received in his office.
- g) The manager for Century 21 Conexus Realty Ltd. indicated that the Statement of Disclosure form is a requirement when a registrant is dealing with a trade in real estate on behalf of themselves or their family. His belief was that the form was prepared and faxed but not returned but they had no proof of this occurring. They did not keep records for this form going back to June or July of 2007.
- h) It should be noted that a Statement of Disclosure form, dated July 12, 2007 and signed by Dwayne Kok in front of a witness, was presented as evidence. The acknowledgment

of receipt of the above Statement of Disclosure was not signed on that documentation and there was no evidence led to indicate that such documentation was ever provided to the Seller.

- i) Mr. Kok gave evidence on his own behalf, much of which was on the basis that he had substantial financial resources and could have made this transaction a cash deal. In the Offer to Purchase, he indicated that the purchase price was to be paid by a \$50,000 deposit, \$50,000 of other financing and the balance of cash to be paid upon the date of completion. Mr. Kok indicated he did not fill in paragraph 1.2 (c) for a new mortgage as he did not know the amount of the mortgage at that time. However, he did make a condition that there was to be mortgage approval. He did not do a Phase 1 Environmental Assessment. Mr. Kok determined that the overall feasibility of the project was not appropriate. Mr. Kok indicated that he thought the project was subject to his coming up with financing to do the entire project.
- j) Mr. Kok also indicated that he had sent the Statement of Disclosure form on June 12, 2007. He was not aware it was not received until after an investigation was commenced by the Saskatchewan Real Estate Commission. He said follow up is normally done by the conveyancing secretary; however, he understands it is his responsibility to do the follow up. He acknowledged that he would probably be found guilty of the offence charged but felt there was no harm that occurred to the Seller because of the lack of delivery of this document. He indicated he was usually good in following up with forms; however, he was unable to explain what happened in this particular case.

DECISION

The hearing committee found the registrant, Dwayne Kok guilty of professional misconduct by failing to provide the mandatory Statement of Disclosure form. The hearing committee was at the opinion that there was a clear failure to provide the mandatory Statement of Disclosure form.

SANCTIONS

In accordance with clauses 38(1)(f) and 38(2)(b) and subclauses 38(2)(a)(i) and 38(2)(a)(ii) of the *Act*, the Committee made the following orders:

1. For the violation of Section 39(1)(c) of *Act* and a breach of Bylaw 730(f):
 - a) Pursuant to clause 38(1)(f) of the *Act*, that Dwayne Kok receive an order of reprimand;
 - b) Pursuant to subclause 38(2)(a)(i) of the *Act*, that Dwayne Kok, prior to September 1, 2008, pay to the Saskatchewan Real Estate Commission a \$1,500.00 fine for the said violation of the *Act*;
 - c) Pursuant to subclause 38(2)(a)(ii) of the *Act*, Dwayne Kok pay costs of the Hearing in the amount of \$2,500.00 prior to September 1, 2008; and

- d) Pursuant to clause 38(2)(b) of the *Act*, that Dwayne Kok's registration shall be suspended if he fails to pay any portion of the fine within the said period of time.

RATIONALE

The breach of the Bylaw 730(f) in the circumstances of this case is abundantly clear. The Statement of Disclosure form must be presented before the offer is presented not done afterwards. On June 12, 2007 even had the form been presented, it was still a breach of the *Act*. The onus is on the registrant to ensure delivery takes place.

The purpose of the disclosure document is more than just to advise the parties that the prospective purchaser is a REALTOR. It also indicates the amount of commission the party is receiving, what specific use they will be making of the property and if there is any special knowledge to be had by the REALTOR in making the offer. It is important that this information be presented to the prospective seller before he/she decides whether to accept the offer. This form is for the protection of the public and for real estate agents to ensure there is no misunderstanding between the parties.

The registrant was somewhat concerned that this was essentially a technical breach of the *Act*. He was looking at the integrity of the people involved and felt he was trying to do the best in the circumstances. The fact that the Statement of Disclosure did not get delivered was not harmful to the parties in the transaction. The Hearing Committee does not accept that argument and feels it is a breach of the *Act* and these mandatory forms must be used whether or not the registrant felt it was harmful to the parties. Mr. Kok was concerned that this was almost a form of entrapment as this would not have occurred if the agent for the sellers had not allowed it to have been done. He argued that everyone was aware that he was a REALTOR. The obligation is on Mr. Kok to provide the Statement of Disclosure whether or not the other agent asks for it. Mr. Kok also felt all matters had been done in good faith and the hearing committee took no issue with that statement.

Mr. Miller, in his comments, indicated that Mr. Kok is not a bad person; the issue was the proper process, not the person, in this circumstance. The evidence was certainly not contradictory in this hearing and the Investigation Committee invited the Hearing Committee to look at the broad scope of the issues related to not using mandatory forms and not providing proper disclosure. He suggested that there should be a fine to provide specific deterrence to Mr. Kok in order for this not to occur again. A registrant must take ownership of his/her own actions and most certainly there was no entrapment that took place in this case. Mr. Miller further indicated that the real estate industry must know that the legislation is being enforced in a fair and equitable manner.

Mr. Kok also indicated that he needed a forum in which to have his case heard. He felt he was a good person and it was not the failure to provide the Statement of Disclosure that had to do with the transaction falling apart.

The Hearing Committee was concerned that this form must be used. It is an important form to provide disclosure to the parties of an interest by a REALTOR in the purchase and the document is simply mandatory. The use of a mandatory form cannot be relieved by the other registrant indicating that it is okay. It is not a discretionary matter but one which is mandatory. The Commission is hearing of more infractions of this type and wish to stress that the forms are indeed mandatory, not discretionary.

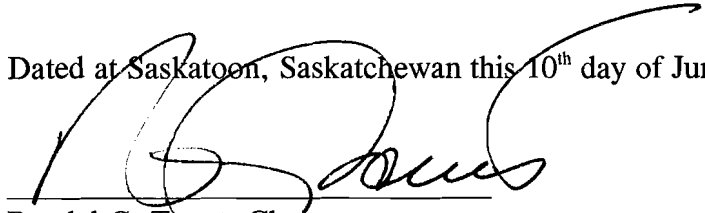
The Hearing Committee also wished to reassert that when a registrant is involved in a transaction more care, not less care, is required. The registrants must comply with all technical requirements. They are important and mandatory. All documentation must be completed properly. The Hearing Committee took note that the manner in which the original Residential Contract of Purchase and Sale was prepared by Mr. Kok led to potential confusion as Mr. Kok thought it was a financed transaction whereas on a quick reading of the Offer to Purchase, it appeared to be set forth as a cash transaction.

The Hearing Committee also noted that all parties were aware that Mr. Kok was a REALTOR and there was no potential gain to him in not providing the Statement of Disclosure as it was clear in the face in the Residential Contract of Purchase & Sale form. However, Mr. Kok is an experienced REALTOR and he knows that the Statement of Disclosure must be sent before the offer is present. The Committee also noted that there was no indication of remorse from Mr. Kok in this matter.

Mr. Kok's previous conviction a number of years ago was not a factor in the deliberation or setting the amount of the fine which are consistent with the Howsam case (06-65) where there was failure to disclose and Mr. Howsam was fined \$1000.00. As well, the failure to use a mandatory ancillary form by Linda Swehla (07-27) where she again issued a \$1000.00 fine.

The Hearing Committee was somewhat concerned that Mr. Kok, while in the course of his evidence, indicated that he knew he was to be found guilty as the form was not presented in a timely fashion but he wanted the forum to discuss this matter. The costs were therefore assessed against him in the amount of \$2,500. It is not appropriate simply to have this matter come before the Commission in order to vent your concerns. This matter could have been dealt with in a mitigation hearing without the significant costs associated, that are well in excess of \$3,000.

Dated at Saskatoon, Saskatchewan this 10th day of June, 2008.


Randal C. Touet, Chairperson

