

**IN THE MATTER OF**  
**THE REAL ESTATE ACT, C. R-1.3**  
**AND**  
**IN THE MATTER OF JANE SMITH**

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**DECISION OF THE**  
**SASKATCHEWAN REAL ESTATE COMMISSION**

**Commission File: #2008-79**

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Before: A Saskatchewan Real Estate Commission Hearing Committee  
comprised of the following:  
Randal C. Touet - Chairperson  
Larry Gingerich  
John Puderak  
Wayne White

Appearances: Ed Miller, on behalf of the Investigation Committee  
Jane Smith, Registrant

Hearing Date: January 18, 2010

Written Decision: February 2, 2010

The Mitigation Hearing was held January 18, 2010 at the Saskatoon Club, 417 - 21<sup>st</sup> Street East, Saskatoon, Saskatchewan before a Hearing Committee (“the Committee”) of the Commission. The Statement of Facts and Admissions dated December 18, 2009 provided particulars of Jane Smith’s violation and admissions.

### **CHARGE and ADMISSION OF MISCONDUCT**

The registrant was charged with and has admitted, in the Statement of Facts and Admissions, to professional misconduct as follows:

Between Monday, September 21, 2008 and Saturday, September 27, 2008 Jane Smith set into motion a chain of events that resulted in the keys being released to the buyer of real property without first receiving approval from the sellers or at the direction of the sellers’ lawyer.

### **LEGISLATION**

Section 39(1)(a) of *The Real Estate 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 harmful to the best interests of the public, the registrants or the Commission.”

### **FACTS**

In accordance with subsection 9(4) of *The Real Estate Regulations* (“the Regulations”), the Committee accepted Jane Smith’s Statement of Facts and Admissions, which included the following relevant points:

1. Jane Smith has been continuously registered under the provisions of *The Real Estate Act* in the Province of Saskatchewan with the Saskatchewan Real Estate Commission since April 22, 2004.
2. Jane Smith successfully completed the following courses:
  - Fundamentals of Real Estate;
  - Principles of Real Estate Appraisal;
  - Principles of Real Property Law; and
  - Principles of Mortgage Financing.
3. Jane Smith completed the continuing professional development seminars each registration year since 2003-2004.
4. Jane Smith is presently registered under the provisions of *The Real Estate Act* as a salesperson with Prince Albert Real Estate Ltd. o/a Re/Max P.A. Realty.
5. On or about August 1, 2008, the Buyer, with Jane Smith acting on her behalf, entered into a Residential Contract of Purchase and Sale and accepted a subsequent Counter Offer with the Sellers. Some of the details include:
  - Purchase price of \$210,000.00;

- Deposit of \$1,000.00;
  - New mortgage of \$190,000.00;
  - Other financing of \$4,000.00;
  - Balance of cash of \$15,000.00; and
  - Possession date noon on Friday, September 26, 2008.
6. A couple of days prior to possession, the Sellers' agent, another real estate agent in Jane Smith's office, offered Jane Smith the opportunity to take possession of the keys to the Sellers' property as he was not going to be physically present at noon on the possession date. Jane Smith received the Sellers' keys from the agent with the undertaking that no release of the keys to the Buyer could occur until the Sellers' lawyer confirmed the keys could be released.
  7. Jane Smith was at the Re/Max P.A. Realty office until about 1:00 p.m. on September 26, 2008, at which time she had to leave the office for the day. When she left the brokerage office that day, she had received no confirmation from the Sellers' lawyer nor the Sellers' real estate agent that she could release the Sellers' keys to the Buyer.
  8. In anticipation that the transaction would complete on September 26, 2008 and just before she left the brokerage at 1:00 p.m. on September 26, 2008, Jane Smith placed the Sellers' keys to the property in an envelope addressed to the Buyer and left the envelope at the front desk at Re/Max P.A. Realty.
  9. Sometime on Friday afternoon September 26, 2008, during a telephone call with the Buyer's lawyer, Jane Smith says the lawyer told her that he "did not see any problem with releasing the keys." Thereafter, Jane Smith telephoned the Buyer and told her that that she had left the keys in an envelope with the Buyer's name on it and told the Buyer that the keys could probably be released if insurance and mortgage documents were completed. The Buyer told Jane Smith that in the afternoon she was intending to obtain insurance and mortgage and once complete, she would go to the Re/Max P.A. Realty office and pick up the keys.
  10. Moments after the telephone call with the Buyer on September 26, 2008, Jane Smith received a telephone call from the Buyer's lawyer advising that the Sellers' lawyer said that the keys should not be released. Immediately thereafter, Jane Smith unsuccessfully attempted to contact the Buyer by cell phone to inform her not to pick up the keys.
  11. At no time on Friday September 26, 2008 did Jane Smith telephone her broker or the Sellers' agent at the Re/Max P.A. Realty office and direct that they not release the envelope with the keys to the Buyer. Sometime between 4:00 and 5:00 p.m. on September 26, 2008, Jane Smith spoke by telephone with another registrant with Re/Max P.A. Realty and told her about the Buyer's pending mortgage and insurance confirmations and the requirements for the release of keys.
  12. During the afternoon of September 26, 2008, Jane Smith made enquiries and confirmed that the Buyer purchased insurance for the property. Jane Smith was not physically in

the Re/Max P.A. office on September 26, 2008 when the Buyer picked up the keys to the property. It is unknown from whom the Buyer picked up her envelope.

13. The Buyer picked up her envelope containing the keys from someone at the front desk at the Re/Max P.A. Realty office on the afternoon of Friday, September 26, 2008 and she moved into the property on Saturday, September 27, 2008.
14. Title transferred to the Buyer on Wednesday, October 1, 2008.

## **REPRESENTATIONS**

The Investigation Committee representative, Ed Miller, confirmed that Jane Smith was a first time offender under the *Act* and that she had less than four years experience as a registrant at the time of the offense. He noted that the trade in real estate did complete.

Mr. Miller confirmed that Jane Smith was cooperative in the investigation and admitted her mistake. She understands the consequences of her actions and that led to her admitting guilt for a breach of the *Act*. Mr. Miller stressed that this is a very basic error in a trade in real estate and the release of keys must only be done when authorized by the seller. While it did not occur in this instance, there was the potential for substantial harm to occur due to the actions of the registrant.

The Investigation Committee recommended a letter of reprimand and a fine of at least \$2,500.00 for breach of Section 39(1)(a) of the *Act*.

Mr. Miller referred the Committee to the Donna Aldous case (2008-01) where she received a fine of \$500.00 for releasing keys prior to possession date and without the seller's permission; the Beverley Chubb case (2007-22) where he received a fine of \$3,500.00 for keys that were released prior to approval of all documentation and consent of all parties involved; and the Marla Lewis case (2004-28) where a fine of \$1,000.00 was imposed for changing the locks on the property prior to the possession and completion date.

Jane Smith said she found this to be an unnerving situation. She felt the Donna Aldous decision was the closest to hers and that a fine of \$500.00 would be more appropriate. Jane Smith filed a letter with the Commission, in which she apologized to for the time and monies spent in regard to the investigation and hearing. She also apologized to the Sellers and their legal counsel. Jane Smith said she did not know that it was a "compulsory" procedure to wait for permission from the sellers' lawyer to release keys. She said that there was no management in place at the day of the incident as they were gone for the long weekend. Jane Smith thought that common sense would prevail. She said that the Buyer's lawyer and she had all the information about the Buyer; that the Sellers and their lawyer did not have all the information.

Jane Smith felt she was acting beyond what was expected because she had all the knowledge. She said she knew the Buyer and did not want to lose the transaction. Jane Smith felt it was her responsibility to decide when to release the keys and she felt she was doing the right thing.

## DECISION

In accordance with The Real Estate Act, Bylaws and Regulations, the Committee made the following orders:

- a) Jane Smith receive an order of reprimand for the violation of Section 39(1)(a) of the Act;
- b) Jane Smith, prior to March 31, 2010, pay to the Saskatchewan Real Estate Commission, a \$3,000.00 fine for the said violation of the *Act*; and
- c) Jane Smith's registration shall be suspended if she fails to pay any portion of the fine within the said period of time;

## RATIONALE

The Committee, in considering the disciplinary action, considered Jane Smith's lack of previous sanction history and the length of time she had been in the real estate industry.

The Committee wishes to stress that the release of keys to purchaser in a real estate transaction is the responsibility of the seller. This is done through their lawyer who advises the listing agent to release the keys to the buyer's agent, when all matters have been attended to. It is not for the selling agent to determine when the keys are released. The possession is granted by the seller, not taken by the buyer. This is both a basic part of the trade in real estate and a factual statement. The decision resides with the seller. There may be many reasons for keys not to be released, from the mortgage not being signed to monies not being in place, to there being a problem with the transaction that only came to light after the offer had been made.

The release of keys in this situation was a significant risk to the parties. While the transaction ultimately did complete, there was not authorization from the seller to give the keys to the buyer. It is not for the selling agent to make the decision for the seller. The selling agent acts for the buyer, not for the seller. The knowledge Ms Smith had is that of the buyer, not of the seller and she did not have the responsibility to make the decision. The Hearing Committee wants to be very clear that the responsibility for releasing the keys comes from the seller. It is important to note that the keys were given to Ms Smith on the understanding that she was not to release them until confirmed by the Sellers' lawyer. Her responsibility was to release the keys when she received this permission. It did not occur and the only confirmation of any kind she received was through the Buyer's lawyer who thought all was okay and later said it was not okay to release the keys.

It is important for all registrants to be aware that the giving up of possession of property must be done with the consent and direction of the seller of that property. The Committee was concerned that Ms Smith was not clear in her understanding of that issue and this decision is both to make it absolutely clear to her and to all registrants that the seller makes the decision. While Ms Smith may have felt she had done the right thing in this instance, the Committee stresses she did not, the decision was not hers to make.

Dated at Saskatoon, Saskatchewan this 2<sup>nd</sup> day of February, 2010.

  
Randal C. Touet, Chairperson