

**IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT
TO BY-LAW NO. 10 OF THE REAL ESTATE COUNCIL OF ONTARIO**

GINO DI CENSO / SUTTON GROUP TOWER REALTY INC.

Respondents

DATE OF DECISION: **January 28, 2004**

FINDINGS:

Gino Di Censo: **In violation of Rules 1, 2, 3, 4 & 6
of the RECO Code of Ethics**

Sutton Group Tower: **In violation of Rules 43 & 44
of the RECO Code of Ethics**

PENALTY:

G. Di Censo: **Administrative Penalty of \$3000 payable to
RECO within 60 days of this decision.**

Sutton Group Tower: **Administrative Penalty of \$2000 payable to
RECO within 60 days of this decision.**

COSTS AND EXPENSES: **Costs of \$1350 to be paid jointly and severally by
Mr. Di Censo and Sutton Group Tower within
60 days of this decision.**

REASONS FOR DECISION

This matter proceeded to the Discipline Committee of the Real Estate Council of Ontario ("RECO") on an agreed statement of facts. There was also a joint submission as to penalty. The following are the agreed statement of facts:

Mr. Gino Di Censo ("Di Censo") is a member of the Real Estate Council of Ontario (RECO) and registered as a salesperson under the *Real Estate Business and Brokers Act* R.S.O. 1990 c. R-4 ("REBBA").

Sutton Group Tower Realty Inc. (“Tower Realty”) is a member of RECO and registered as a broker under REBBA.

On or about February 21, 2002, Di Censo met with Seller to list her property. At first, Seller was reluctant to list her property. Eventually, Seller agreed to list her residential property municipally known as 1 A Street at \$289,900.00 with an expiry date of May 21, 2003. Di Censo provided the pink carbon copies of the MLS listing to Seller.

On or about February 27, 2003, during a subsequent visit, Di Censo made changes to the MLS Listing Agreements and had Seller initial the changes.

On or about February 24, 2003, Di Censo contacted a prospective buyer, Buyer and informed the buyer that 1 A Street was listed for sale.

With respect to dual agency, there was no indication on Di Censo’s part that before the offer was submitted that agency or dual agency was explained or agreed to by the parties.

The Confirmation of Representation, included on page two of the Offer, stated that Di Censo was acting on behalf of the seller and the buyer. In addition, the first page of the Offer indicated that there was a dual agency relationship.

The clause on dual agency in front of the Offer states:

The parties to this transaction hereby acknowledge that the listing broker represents the interests of the Seller and the Buyer, and there has been, and is, dual agency. The Seller and the Buyer have previously acknowledged and consented to such dual agency.

However, there was no written representation agreement, confirmation of representation or any acknowledgment of any kind between Di Censo, the seller and/or the buyer to indicate the role Di Censo was to play in the transaction. In fact, there was no documentation whatsoever that indicated that the sellers and buyers, prior to the offer being submitted, consented to dual agency and/or the role of Di Censo.

The MLS listing indicates that a new oil tank will be replaced. However, Di Censo failed to draft a condition in the offer with respect to the removal/replacement of the oil tank and to address the issue of potential costs to either the seller or buyer.

In addition, Di Censo agreed to reduce the commission from 6% to \$10,000.000 plus GST. However, this was not committed and agreed to in writing by Seller and Tower Realty in a separate document. The bottom of the Agreement of Purchase and Sale states in printed capital letters: “TOTAL COMM. \$10,000 + GST.” The Agreement of Purchase and Sale is not an appropriate document for commission changes or issues between seller and listing broker.

Accordingly:

Di Censo acted in an unprofessional manner:

- Failing to draft a condition in the offer with respect to the removal/replacement of the oil tank and the potential cost to either the seller/buyer
- Failing to explain agency to the parties and get an acknowledgment in writing
- Failing to adequately disclose in writing his role in the transaction to the parties
- Failing to get confirmation of representation in writing from the parties prior to the Agreement of Purchase and Sale being submitted
- Failing to commit the reduction in the amount of the commission in writing on an appropriate document

And thereby breached the following rules in the *Code of Ethics*:

Rule 1 Ethical Behaviour

A Member shall:

- (1) endeavour to protect and promote the best interests of the Member's Client,
- (2) endeavour to protect the public from fraud, misrepresentation or unethical practice in connection with real estate Transactions,
- (5) deal fairly, honestly and with integrity with the public, other Members and third parties,

Rule 2 Primary Duty to Client

A Member shall endeavour to protect and promote the best interests of the Member's Client. This primary obligation does not relieve the Member of the responsibility of dealing fairly, honestly and with integrity with others involved in each transaction.

2.1 A Member has a fiduciary duty, professionally and at law, to endeavour to protect and promote the interests of the Members Client to the extent that he or she may ethically or legally do so. This relationship of trust means that the Member never puts the Member's interests above those of the Client. Competence, diligence, full disclosure, obedience, loyalty, confidentiality and complete accounting are included in this duty.

2.5 A Member should fully disclose to the Member's Client, at the earliest practical opportunity, any information that the Member knows or ought to know which could affect the decision to proceed with the transaction. The Member should disclose to the Member's Client the material steps that the Member takes on the Client's behalf.

Rule 3 Disclosure of Role

At the earliest practical opportunity, but no later than when the Member Accepts an Agency, a Member shall fully disclose in writing the role and nature of the service that the Member shall be providing to the Person. The Member shall also disclose the Member's role to others involved in the Transaction when appropriate.

Disclosure of Role

3.1 A Member is strongly advised to obtain a written acknowledgment of the disclosure of the Member's role from the Person. Requesting a written acknowledgment brings home to the Person the seriousness of the disclosure. The written acknowledgment also provides evidence that the necessary disclosure has been made.

3.2 Disclosure of a Member's role includes identifying whether he or she is representing the Seller, the Buyer, or some other party to the Transaction. The Persons involved in the Transaction, including their representatives, should be clearly informed of the role of the Member in the Transaction.

Rule 4 Written Representation Agreements

A Member shall enter into a written Representation Agreement with a Client at the earliest practical opportunity, and in all cases before any Offer to Purchase is submitted.

4.1 A Representation Agreement should specify the role and nature of services of the Member, the duration of the Agreement, the compensation of the Member and the other expectations and obligations of the Member and the Client.

4.2 A Member should put any representation or promises in writing including a representation or promise to permit the early cancellation of a listing or a representation agreement or a representation or promise to rebate or reduce a commission in some circumstances. Section 24 of the Real Estate and Business Brokers Act has special requirements for representations or promises to resell any real estate, Purchase or Sell real estate, to obtain a mortgage, lease or loan and some similar Transactions.

Rule 6 Written Transaction Agreements

A Member shall ensure that Agreements regarding Transactions are in writing, expressing the specific terms, conditions, obligations and commitments of the Parties to the Agreement. A copy of each accepted Agreement shall be furnished to each Party upon its final Acceptance.

6.1 An accepted Agreement includes amendments, waivers and other related documents.

Accordingly:

Sutton Group Tower Realty Inc. acted in an unprofessional manner:

- Failing to supervise the activities of Di Censo
- Failing to keep reasonable documentation on file (agency, disclosures)

And thereby breached the following rules in the *Code of Ethics*:

Rule 43 Broker Responsibility

A Broker shall be responsible for the professional conduct and professional actions of those Members registered with that broker.

43.1 This Rule applies regardless of the legal relationship between the broker and the Member registered with that broker.

Rule 44 Record Keeping

A Member shall maintain reasonable records of the Members professional services including any records specified by the Council.

Based on the above-agreed statement of facts and admissions with respect to breaches of various provisions of the Code of Ethics, the joint recommendation with respect to penalty was that Mr. DiCenso be ordered to pay a penalty of \$3,000 within 60 days of the

decision of the Discipline Committee.

It was also recommended that Sutton Group Tower Realty Limited be ordered to pay a penalty of \$2,000 within 60 days of the decision of the Discipline Committee.

There was also a recommendation with respect to costs, asking that DiCenso and Sutton Group Tower Realty Limited be, jointly and severally, liable to pay costs of \$1,350 within 60 days of the decision of the Discipline Committee.

This panel has carefully reviewed the agreed facts and the joint submission as to penalty. We believe that the joint submission as to penalty, based on the facts, is appropriate under the circumstances and therefore accept the agreed upon statement of facts and joint recommendations as to penalty.