



Real Estate Council of Ontario

DISCIPLINE DECISION

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

BETWEEN:

**MANAGER OF COMPLAINTS, COMPLIANCE AND DISCIPLINE
REAL ESTATE COUNCIL OF ONTARIO**

- AND -

BRIAN GOG EK

DATE OF DECISION: December 5, 2006

FINDINGS: In violation of Rules 1(1), 1(5), 2, 3, 4, 42 and 45 of the RECO Code of Ethics

PENALTY: Administrative Penalty of \$8,000.00 payable to RECO and confirmation to the Discipline Committee of completion of "Disclosure and the Real Estate Professional", "Avoiding Risk and Liability", "REBBA 2002" and "REBBA 2002 Code of Ethics" continuing education courses within 180 days of sending this decision.

COSTS AND EXPENSES: No costs awarded

WRITTEN REASONS:

REAL ESTATE COUNCIL OF ONTARIO (RECO) v. BRIAN GOG EK

This hearing was held on December 5, 2006 and proceeded by way of an Agreed Statement of Facts and Joint Submission as to Penalty that was entered into by RECO and the Respondent. The Respondent did not appear before the Panel. Rather, the Agreed Statement and Joint Submission was presented to the Panel by RECO's prosecutor (and was marked as Exhibit 1 in this proceeding). RECO's prosecutor then made submissions on behalf of all parties to the proceeding.

The Agreed Statement and Joint Submission (Exhibit 1) read as follows:

AGREED STATEMENT OF FACTS AND PENALTY

1. Brian Gogek ("Mr. Gogek") is a member of RECO and at all relevant times was registered as a salesperson under the Real Estate and Business Brokers Act (the "Act") with the broker Brokerage A.
2. In February 2004 Mr. Gogek agreed to represent Buyer A, a long time friend, respecting her purchase of a new home. Mr. Gogek did not enter into a buyer agency agreement or clarify in writing his role and the services he would be providing.
3. On or about February 17, 2004, Mr. Gogek paid, on behalf of Buyer A, \$5,000.00 by cheque (the "February 17 Deposit Cheque"), payable to Company 1A carrying on business as Company 2A, representing a deposit on a property known as 1-A Street, City A, Province (the "Property"). Mr. Gogek indicated to Company 2A's representative that Buyer A wanted to make an offer and that he wished to provide deposit cheques at that time to hold the purchase price so as to give Buyer A time to sign an agreement of purchase and sale.
4. The February 17 Deposit Cheque was drawn on the account of Company B. Mr. Gogek was the principal of Company B. Mr. Gogek indicated to Company 2A's representative that the February 17 Deposit Cheque was drawn on an account that he, not Buyer A, controlled.
5. The February 17 Deposit Cheque was paid pursuant to the terms of a draft agreement of purchase and sale for the Property (the "Agreement of Purchase and Sale") by which Buyer A would buy the Property from Company 2A for \$364,990.00. The purchase price was partially payable in three deposits of \$5,000.00 on February 17, 2004 (as per the February Deposit Cheque), \$5,000.00 on April 30, 2004 and \$10,000.00 on June 30, 2004. Therefore, the total of all three deposits was \$20,000.00. The balance of the purchase price was due on the closing date of June 24, 2005.
6. Mr. Gogek also provided Company 2A's agent with post-dated cheques dated April 30, 2004 and June 30, 2004, representing the remaining deposits owing per the draft Agreement of Purchase and Sale (the "April 30 Deposit Cheque and June 30 Deposit Cheque"). The April 30 and June 30 Deposit Cheques were drawn on Company B's account.

7. Buyer A signed the Agreement of Purchase and Sale, including the above –noted deposit terms, on or about February 19, 2004. It was accepted by Company 2A on February 23, 2004.
8. Mr. Gogek was trading in real estate within the meaning of the Act with respect to the Agreement of Purchase and Sale. He anticipated receiving remuneration with respect to the transaction set out in that Agreement (the “Transaction”). Notwithstanding this, he did not inform his broker, Brokerage A about the Transaction, nor did he provide Brokerage A with a copy of the Agreement of Purchase and Sale.
9. Mr. Gogek asked Buyer A to compensate Company B for the February 17, April 30 and June 30 Deposit Cheques, which she agreed to. Mr. Gogek understood that Buyer A was going to pay Company B at times and in amounts sufficient to cover those Deposit Cheques as per the Agreement of Purchase and Sale. However this was not documented. In fact, on March 18, 2004, Buyer A directed a payment of \$5,000.00 to Company B. On or about April 29, 2004, Buyer A directed a payment of \$4,000.00 to Company B. On or about May 25, 2004, Buyer A directed a payment of \$1000.00 to Company B. The total Buyer A paid to Company B by June 30, 2004 was \$10,000.00.
10. On March 11, 2004, the February Deposit Cheque was not honoured due to insufficient funds.
11. On or about March 28, 2004, Mr. Gogek arranged to have \$5,000.00 paid to Company 2A to replace the dishonoured February 17 Deposit Cheque.
12. On May 3, 2004, the April 30 Deposit Cheque was not honoured due to insufficient funds.
13. On or about May 26, 2004, Counsel for Company 2A wrote to Counsel for Buyer A that if the dishonoured April 30 Deposit Cheque was not replaced by June 2, 2004, the Transaction would be terminated.

14. On or about June 4, 2004, Mr. Gogek arranged to have \$5,000.00 paid to Company 2A to replace the dishonoured April 30 Deposit Cheque. Company 2A agreed to revive the Transaction, because the deposit owing as of that point in time had been paid.
15. On July 2, 2004, the June 30 Deposit Cheque was dishonoured due to insufficient funds.
16. Counsel for Company 2A requested of Counsel for Buyer A that the dishonoured June 30 Deposit Cheque be replaced by August 5, 2004, or the Transaction would be terminated.
17. On or about July 19, 2004, Mr. Gogek informed Buyer A that the June 30 Deposit Cheque had been returned due to insufficient funds.
18. On or about July 21, 2004, Buyer A made a payment of \$10,100.00 to Company B for the express purpose of covering the remaining deposit owing as of June 30, 2004, along with any NSF charges. Mr. Gogek still did not inform Brokerage A of the Transaction or of these monies, nor did he forward these monies to Brokerage A.
19. On or about July 28, 2004, Mr. Gogek arranged to pay \$5,000.00 in partial replacement of the dishonoured June 30, 2004 Deposit Cheque.
20. On August 6, 2004, Mr. Gogek paid another cheque drawn on Company B's account for \$5,000.00 representing the remainder of the deposit owing as of June 30, 2004 (the "August 6 Replacement Cheque"). On August 9, 2004, the August 6 Replacement Cheque was not honoured due to insufficient funds.
21. On August 25, 2004, pursuant to notices previously given by Company 2A's Counsel to Buyer A's Counsel, the Transaction was terminated. Company 2A indicated it would hold the \$15,000.00 in deposits already paid to it as liquidated damages.
22. On or about August 30, 2004, Mr. Gogek attempted to revive the Transaction by sending a bank draft to Company 2A for \$5,000.00. Mr. Gogek represented himself as Buyer A's representative and provided his business card, which identified him as a salesperson trading on behalf of Brokerage A. Company 2A returned the August 30 bank draft and refused to revive the Transaction.

23. Company 2A later entered into a new agreement of purchase and sale with Buyer A for another property, and credited Buyer A with \$10,000.00 towards the purchase of that property.
24. Mr. Gogek has since the complaint was made, compensated Buyer A in the amount of \$10,100.00, representing the remainder of the deposit she had paid and for which she did not receive a credit from Company 2A (i.e. \$5,000.00 paid to Company 2A and not repaid, and \$5,100.00 paid to Company B and not forwarded to Company 2A), plus her legal costs of \$2,500.00 in connection to this matter.
25. Mr. Gogek is responsible under the following Rules of the RECO Code of Ethics:

Rule 1 – Ethical Behaviour – A Member shall:

- (1) endeavour to protect and promote the best interests of the Member's Client,
(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.

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.

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.

Rule 42 – Competence – A Member shall render conscientious service with the knowledge, skill, judgment and competence, in conformity with this Code of Ethics and the standards, which are reasonably expected of Members. When the Member is unable to render such a service, either alone or with the aid of another Member, the member shall decline to act.

Rule 45 – Financial Responsibility – A Member shall be financially responsible in the Members practice of the profession.

AGREED PENALTY:

Brian Gogek be ordered to pay a penalty of \$8,000.00 within 180 days of the date of the decision of the Discipline Committee.

Brian Gogek provide confirmation to the Discipline Committee that he has completed the “Disclosure and the Real Estate Professional” “Avoiding Risk and Liability” “REBBA 2002” and “REBBA 2002 Code of Ethics” continuing education courses, within 180 days of the date of the decision of the Discipline Committee.

The undersigned Parties consent that this matter is settled by way of this Agreed Statement of Facts and Joint Submission as to Penalty.

Accordingly, the Agreed Statement of Facts and Joint Submission as to Penalty will be heard at RECO Chambers on a date chosen by the RECO.

Brain Gogek acknowledges that, should he wish to attend at RECO on the date that the Agreed Statements of Facts and Joint Submission as to Penalty is heard by the Discipline Committee that he will advise RECO forthwith.

Brian Gogek acknowledges that he was advised of his right to be represented by Counsel in this matter and that he exercised that right.

DECISION OF THE PANEL

After considering the joint submission presented by RECO’s prosecutor and after considering the facts consented to by the parties, the Panel has concluded that the facts support the findings of liability as set out in Exhibit 1. Further, the Panel has concluded that the penalty consented to by the parties in Exhibit 1, is reasonable and appropriate in the circumstances of this case. Accordingly, an order shall be issued as set out above.