



Real Estate Council of Ontario

---

**IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT TO THE  
*REAL ESTATE AND BUSINESS BROKERS ACT, 2002*, S.O. 2002, c. 30, Sch. C**

**BETWEEN:**

**REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002***

**- AND -**

**GORDON GIFFORD**

---

**DISCIPLINE DECISION AND REASONS FOR DECISION**

---

**APPEARANCES:**

**For the Registrant:**

Gordon Gifford

**For the Real Estate Council of Ontario:**

Timothy Snell, counsel  
Chantel Marler, paralegal

**Heard in Toronto on:**

August 29, 2017

---

**FINDINGS:**

In violation of Sections 2(1), 4, 5 and 14 of the Code of Ethics.

**ORDER:**

Counsel for the Registrar, *REBBA 2002* to deliver written submissions to the Panel and to the Respondent on the issue of penalty and costs within 15 days of the date on which the Panel's decision and reasons are delivered.

The Respondent shall deliver to the Panel and to Counsel for the Registrar, *REBBA 2002* its written submissions on penalty and costs in response to Counsel for the Registrar, *REBBA 2002*'s submissions within 15 days of the date on which Counsel for the Registrar, *REBBA 2002*'s submissions on penalty and costs are delivered to the Respondent.

Counsel for the Registrar, *REBBA 2002* shall deliver to the Panel and to the Respondent its reply to the written submission on penalty and costs of the Respondent within 5 days of the date on which the Respondent's submissions on penalty and costs are delivered to

Counsel for the Registrar, *REBBA 2002*.  
Any inquiries relating to the delivery of the above-mentioned documents should be directed to the Hearings Coordinator.



Real Estate Council of Ontario

---

**IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT TO THE  
*REAL ESTATE AND BUSINESS BROKERS ACT, 2002, S.O. 2002, c. 30, Sch. C***

**BETWEEN:**

**REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002***

**- AND -**

**BROKERAGE A**

---

**DISCIPLINE DECISION AND REASONS FOR DECISION**

---

**APPEARANCES:**

**For the Registrant:**

No one

**For the Real Estate Council of Ontario:**

Timothy Snell, counsel  
Chantel Marler, paralegal

**Heard in Toronto on:**

August 29, 2017

---

**FINDINGS:**

Not in violation of the Code of Ethics.

**REASONS FOR DECISION**

**INTRODUCTION**

This Hearing was held on August 29, 2017 in the presence of the Respondent, Gordon Gifford (the "Respondent" and/or "Mr. Gifford"), Timothy Snell, counsel for the Real Estate Council of Ontario, Chantel Marler, paralegal for the Real Estate Council of Ontario, and Douglas

Cunningham, independent legal counsel to the Discipline Panel. The Broker of Record for Brokerage A (“Brokerage”), a brokerage that had also been named as a party respondent in the proceeding, did not appear.

This matter had been referred to a Disciplinary Panel based on a complaint received by RECO on or about November 30, 2015 from Buyer A. The hearing related to the circumstances surrounding Buyer A’s purchase of 1-A Street, City A (“Property”) in mid-November 2013.

### **ALLEGATIONS BY THE REGISTRAR, REBBA 2002**

In its Allegation Statement the Registrar, REBBA 2002, alleged that Gordon Gifford and Brokerage A had acted unprofessionally when:

1. Mr. Gifford, on behalf of the Brokerage, did not at any relevant time and before Buyer A made an offer for the Property, reduce the Brokerage’s Buyer Representation Agreement (“BRA”) with Buyer A to writing, have it signed on behalf of the Brokerage and submit it to Buyer A for signature. This was contrary to Section 14 of the Code of Ethics to the Act (the “Code of Ethics”) by the Brokerage and Sections 2(1), 4 and/or 5 of the Code of Ethics by Mr. Gifford. Mr. Gifford did not disclose that another registrant, then employed at the Brokerage, would share commission from the 2013 transaction, payable to what the Brokerage identified as the “Selling Agents”, with Mr. Gifford on a 50/50 basis.
2. Buyer A first contacted Mr. Gifford about representation in respect of the 2013 transaction, and/or shortly thereafter, Buyer A inquired about whether he would receive a rebate as buyer and the amount of any rebate. Specifically he asked whether he would receive a rebate representing 1% of the price of any property he purchased. On behalf of the Brokerage and on his own behalf, Mr. Gifford said that any rebate would be “right around” that amount but he would “speak to [his] partners” and confirm. Mr. Gifford did not in a timely way and/or at any relevant time, confirm or clarify this commitment, contrary to Sections 4 and/or 5 of the Code of Ethics, and contrary to Section 38 of the Code of Ethics in respect of only of the duties to use best efforts to prevent error or misrepresentation.
3. In the alternative, Mr. Gifford, on behalf of the Brokerage and on his own behalf, made an oral commitment to Buyer A to pay a commission rebate to Buyer A from the 2013

transaction, and he made this commitment before any offer was made in respect of the 2013 transaction for the Property.

4. In any case, Mr. Gifford, on behalf of the Brokerage, did not reduce the oral commitment that he made with respect to a commission rebate, referred to in paragraph 7 or 8 herein, to writing. This was contrary to Section 14 of the Code of Ethics by the Brokerage and Sections 2(1), 3, 4 and/or 5 of the Code of Ethics by Mr. Gifford, and contrary to Section 38 of the Code of Ethics in respect of only of the duties to use best efforts to prevent error or misrepresentation.
5. On or about November 13, 2013, Buyer A made an Agreement of Purchase and Sale in respect of the 2013 transaction (the "APS") to buy the Property, including the following particulars:
  - a. Purchase Price: \$725,000.00
  - b. Completion date: December 12, 2013
  - c. Co-operating Brokerage Commission of 2%
6. In an email dated November 13, 2013, Mr. Gifford advised Buyer A "*that the cooperating commission is at 2% instead of 2.5%. Your rebate will be @2500.*" This represented a unilateral change to the oral commitment that Mr. Gifford had previously made, contrary to Sections 3 and 4 of the Code of Ethics or in the alternative, Sections 4, and 5 of the Code of Ethics contrary to Section 38 of the Code of Ethics in respect of only of the duties to use best efforts to prevent error or misrepresentation.
7. The Brokerage and/or Mr. Gifford failed to remit any commission rebate to Buyer A at any time contrary to Sections 4 and/or 35 of the Code of Ethics by the Brokerage and contrary to Sections 3, 4, and/or 35 of the Code of Ethics by Mr. Gifford. Furthermore, or in the alternative, the Brokerage and/or Mr. Gifford failed to remit any commission rebate of \$2,500.00 at any time. This is contrary to Sections 4 and/or 35 of the Code of Ethics by the Brokerage and contrary to Sections 3, 4, and/or 35 of the Code of Ethics by Mr. Gifford.
8. Buyer A made numerous attempts including by way of correspondences to remind Mr. Gifford of the issue of the promised rebate and to obtain the rebate. Buyer A once by happenstance met Mr. Gifford in public and Mr. Gifford attributed the failure to pay the

rebate to Mr. Gifford's recent, as represented by Mr. Gifford, Bankruptcy. Mr. Gifford entered Bankruptcy February 25, 2000 and was absolutely discharged on July 16, 2004.

The Registrar, REBBA 2002, alleged that, owing to their various acts and omissions, Gordon Gifford and Brokerage had breached the following sections of the Code of Ethics:

**2. (1) - Brokers and salespersons** - A broker or salesperson shall not do or omit to do anything that causes the brokerage that employs the broker or salesperson to contravene this Regulation.

**3. - Fairness, honesty, etc.** - A registrant shall treat every person the registrant deals with in the course of a trade in real estate fairly, honestly and with integrity.

**4. - Best interests** - A registrant shall promote and protect the best interests of the registrant's clients.

**5. - Conscientious and competent service, etc.** - A registrant shall provide conscientious service to the registrant's clients and customers and shall demonstrate reasonable knowledge, skill, judgment and competence in providing those services.

**14. - Buyer representation agreements** - If a brokerage enters into a buyer representation agreement with a buyer and the agreement is not in writing, the brokerage shall, before the buyer makes an offer, reduce the agreement to writing, have it signed on behalf of the brokerage and submit it to the buyer for signature.

**35. - Financial responsibility** - A registrant shall be financially responsible in the conduct of business.

**38. - Error, misrepresentation, fraud, etc.** - A registrant shall use the registrant's best efforts to prevent error, misrepresentation, fraud or any unethical practice in respect of a trade in real estate.

## **EXHIBITS**

1. Allegation Statement, dated November 21, 2016

2. Notice of Hearing, dated June 19, 2017
3. RECO Book of Documents, dated December 13, 2016

#### **WITNESSES FOR THE REGISTRAR, REBBA 2002**

1. Buyer A
2. Compliance Supervisor A

#### **WITNESSES FOR THE RESPONDENT**

1. Gordon Gifford

#### **OPENING STATEMENT OF THE REGISTRAR, REBBA 2002**

The Prosecutor stated that the evidence would show that no BRA was ever presented by Mr. Gifford to the complainant, Buyer A, to review and execute. Further, although he negotiated an agreement with Buyer A (as the buyer) to rebate to him part of the commission payable to Mr. Gifford on a successful purchase of a property, Mr. Gifford failed to clarify or confirm in a timely manner the commitment he had made, including reducing their understanding to writing. After a successful offer for a property was prepared on Buyer A's behalf, no commission was ever rebated to Buyer A despite his efforts to get Mr. Gifford to honour his commitment.

The prosecutor submitted that there was no *personal* promise on Mr. Gifford's part relating to the commission rebate such that the Brokerage should be relieved of its own obligations in the circumstances. In fact, it was submitted that there were advertisements that Mr. Gifford gave rebates in transactions which were published in the name of the Brokerage. As a result, it was argued that the Brokerage could also be held liable under the *Code of Ethics* for transgressions relating to Mr. Gifford's failure to pay any rebate to Buyer A.

#### **OPENING STATEMENT OF THE RESPONDENT**

Mr. Gifford's opening submissions were straightforward. He stated that he had fulfilled all of the duties he owed to Buyer A in the transaction under review and that he had not breached any provisions in the Code of Ethics. He submitted that the evidence, specifically communications in a number of emails, would provide proof of no transgressions on his part.

## **CODE OF ETHICS**

The Registrant is governed by the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c.30, Schedule C (“REBBA 2002”).

This Discipline Committee is established to hear and determine these issues, in accordance with the prescribed Regulations. The Discipline Committee must determine if the Registrant has failed to comply with the Code of Ethics established by the Minister in accordance with Section 21 of the REBBA 2002.

Section 50 of the REBBA 2002 provides that the Minister may make Regulations establishing a Code of Ethics for the purposes of subsection 21(1).

Ontario Regulation 580/05 is the Code of Ethics pursuant to the REBBA 2002 and is the Code of Ethics that governs these proceedings.

## **RECO Witness – Buyer A**

Buyer A identified himself as the complainant in this case and stated that he had been promised a rebate from part of the commission that Mr. Gifford would be receiving as his agent but that Mr. Gifford never honoured his commitment. The witness stated that he had submitted a successful \$725,000.00 offer for the Property on November 13, 2013.

Buyer A confirmed that Exhibit #3, Tab 5(D), p.14 was the Agreement of Purchase and Sale (“APS”) relating to his purchase of the Property.

Buyer A testified that he is employed by the Business A as a special advisor and that he had first met Mr. Gifford many years ago and had dealings with him concerning the purchase and sale of another property. In that 2007 transaction, the witness had been offered and had received a commission rebate from Mr. Gifford.

Buyer A advised Mr. Gifford in the summer of 2013 that he would be relocating to City A. Although he was interested in working with Mr. Gifford again to find a suitable house in City A,

he had no discussions with respect to any commission rebate during this initial communication with the registrant.

However, after Buyer A's wife saw an advertisement from a competing Realtor offering a commission rebate, which stated "you may qualify to receive a 1% cash back rebate", the issue of Mr. Gifford providing a similar rebate was raised with him.

According to Buyer A, Mr. Gifford stated in response that it would be about the same amount (i.e. 1%) but that he would first have to speak to his partners about that issue.

Buyer A asserted that he was left with a clear understanding from his communications with Mr. Gifford that he would receive a one per cent (1%) commission rebate in a successful transaction if he used Mr. Gifford as his agent.

Reference was made to Exhibit #3, Tab 5(D), p. 30, which was an email from Buyer A's spouse to him in October 2013 advising that Mr. Gifford had "competition" in terms of other agents offering rebates in real estate transactions. Buyer A maintained that he would have changed agents if Mr. Gifford had not agreed to give him a full 1% rebate in a successful transaction.

Still, the witness conceded that Mr. Gifford never got back to him to advise him whether there would be any problem with giving him a 1% rebate from commission payable on the buyer's side of the transaction.

Buyer A eventually purchased the Property in City A for \$725,000.00; he asserted that he expected a rebate of \$7,250.00 from Mr. Gifford.

When referred to Exhibit #3, Tab 5(D), p. 1, which was the initial offer in late October 2013 for the Property, the witness testified that Mr. Gifford never presented him with any written rebate agreement. Further, he stated that he was never provided with a BRA from Mr. Gifford. Buyer A advised that he did not recall being provided with written information or documentation relating to representation issues in his dealings with Mr. Gifford in late 2013.

As far as knowing what Mr. Gifford stood to receive in commissions in a successful transaction, Buyer A stated that he did not have any information on that issue.

It was on November 13, 2013 that Buyer A learned that his \$725,000.00 offer for the Property had been accepted. Buyer A testified that he actually made several attempts to purchase the Property. Initially, he believed the list price for the Property was too high. However, as time passed, the Property was re-listed at a lower price.

Further, just prior to the acceptance of Buyer A's offer on November 13, 2013, Mr. Gifford asked Buyer A whether he wanted to revise the price he had put in his offer [which was at \$725,000.00] to \$720,000.00. According to the witness, that request came at the same time that Mr. Gifford notified him of certain commission-related issues, while suggesting that his rebate would only be \$2500.00. Mr. Gifford wrote to Buyer A early in the morning on November 13, 2013 as follows:

I just noticed that the new listing is only cooperating at 2% instead of \$2.5%. Your rebate will be @ 2500. This also means less interest from other agents in a buyers market. It's a minor factor but worth putting into the equation. let [sic] me now [sic] if you want to revise the offer at \$720k? -- Gord

Six hours later, Buyer A responded to Mr. Gifford's email by writing this message:

Thanks Gord, will review the docs soon when I get to the office. I think we're prepared to stick with 725k firm. However, let me know if you think better strategy to go 720 and leave some room for counters. For our messaging that 0.5pc reduced commission also comes out of our pocket because anything above 2 would have been rebated. – Cheers, Buyer A

At the hearing, Buyer A could not explain the 2500 figure in Mr. Gifford's email, nor did he testify that he understood "2500" to mean "\$2,500.00". Further, no explanation was offered by Buyer A as to why there would be a fixed amount of \$2,500.00 payable as a commission rebate in the circumstances given his previous communications with Mr. Gifford.

After receiving Buyer A's responding email early in the morning on November 13, 2013, Mr. Gifford replied (Exhibit #3, Tab 8, p. 39) as follows:

The 725 is probably best. I was just surprised to see 2% to cooperating agent. I will mention this to Individual A. Basically the..5% is the portion that we normally rebate back.

Buyer A testified at the hearing that, in his view, the reply email from Mr. Gifford confirmed that a rebate would be paid; the witness also said that he was focusing on getting the deal done with the seller of the Property on November 13, 2013 and thus he did not concern himself with the specific amount of the rebate to be paid.

However, after the transaction for the Property closed, Mr. Gifford did not pay any rebate to Buyer A. It was not until several months later that the witness followed up with Mr. Gifford and raised the issue of a commission rebate.

On May 4, 2014 (Exhibit #3, Tab 5(D), pp. 22-23), almost five months after the closing date, Buyer A wrote to Mr. Gifford indicating that he was following up on the commission rebate and, in doing so, he requested that he be advised about same. He stated in part:

We're getting more and more settled in the new place, but it was a heck of a winter to be running an electric furnace! I was catching up on paperwork and wanted to follow-up with you about the commission rebate for the purchaser of 1-A Street – please let me know if a cheque is coming our way!

Mr. Gifford did not respond to the email.

On September 15, 2014, the witness wrote again to Mr. Gifford and asked about the *details* of the commission rebate. Once again, there was no response.

On October 28, 2014, after Buyer A's wife had bumped into Mr. Gifford at a local bakery in City A, the witness wrote that he understood from his wife that Gifford was going to "confirm the rebate details and get in touch with me—can you please let me know where things are at?" Again, there was no response from Mr. Gifford.

On December 1, 2014, another email was sent to Mr. Gifford, this one attaching a copy of a letter that Buyer A had recently sent to Gifford by registered mail. The letter, dated November 22, 2014, stated in part:

As you know it is now almost a year since the closing on our purchase of...[the Property], for which you acted as buyers agent. Unfortunately, despite a number of promises you have not yet paid us the buyer rebate for that transaction. I have also contacted you on numerous occasions and you have not responded.

\*\*\*

I am making one last try to work this out directly by way of this letter. If we have not received the rebate by 5 December 2014, unfortunately I will need to take further action in respect of the non-payment. I sincerely hope that you will do the right thing.

-Regards, Buyer A

Buyer A advised the Panel that he also sent a copy of the above-mentioned letter to the Brokerage but he could not remember the address he had put on the envelope. He stated that he believed he had a good relationship with Mr. Gifford given their previous dealings with each other. The witness asserted that he was friendly with the registrant in his emails but that his objective was to find out what was happening with the commission rebate he had expected to receive.

Buyer A advised that he wrote his letter, dated November 22, 2014, *after* he saw a website advertisement relating to Mr. Gifford in which Gifford outlined the commission rebate he was willing to give to his clients.

After his emails and correspondence to Mr. Gifford, Buyer A stated that he had a chance encounter with the registrant at a local hardware store. According to the witness, Mr. Gifford apologized for not dealing with the rebate issue and explained that things had been financially tight for him such that he was helping his brother with the latter's auto business. Mr. Gifford also told him that he could not put anything in writing about the commission rebate because he was just emerging from bankruptcy.

Buyer A stated that, subsequent to his meeting with Mr. Gifford he conducted a bankruptcy search which revealed that Mr. Gifford had not been bankrupt recently; rather, he had been in bankruptcy a decade earlier.

An entire year passed before Buyer A wrote something further to Mr. Gifford. On November 15, 2015 (Exhibit #3, Tab 6(A), p. 10), the witness claimed in an email that, the last time he spoke with Gifford in April 2015, Mr. Gifford had promised he would get “a payment” to him (Buyer A) “in spring or summer”. Buyer A asked Gifford to advise him immediately whether he would be making “a payment” and that if he (Buyer A) did not receive it by the end of that week he would take legal action against Gifford or follow-up with the real estate board.

On November 19, 2015, the registrant finally responded in writing to Buyer A by advising essentially that a rebate would ordinarily be payable where the Brokerage, acting for a buyer, received a commission in excess of 2%, which was not the case with respect to the second listing for the Property. However, Mr. Gifford invited Buyer A to send him any relevant documentation indicating otherwise and, upon receipt of same, he would be willing to discuss the amount that Buyer A believed he was owed.

Buyer A's response was not to send any such documentation; instead it was to assert for the first time as follows: “Gord, our understanding was 1% rebate and that is what we will be seeking. Buyer A”

On November 21, 2015, Mr. Gifford emailed the witness and stated, “Buyer A, I am not sure when or how or with whom you arrived at 1% I do know that when we were making the offer of November 13, 2013 you clearly understood it was not.” Mr. Gifford forwarded Buyer A's email from the morning of November 13, 2013 to support his position on that issue.

On November 22, 2015, Buyer A responded in an email to Mr. Gifford, advising in part:

At a minimum, you will be obliged to pay the \$2,500 that you committed to on November 13, 2013. One simple question remains: are you going to give us a rebate immediately, or are all future dealings going to be through a formal process?

The email communications (Exhibit #3, Tab 6, pp. 9-10) in November 2015 were referenced at the hearing. They contained inquiries from Mr. Gifford inquiring of Buyer A to explain what he believes he was owed and how he had arrived at any calculation. They did not contain any acknowledgement or admission by Mr. Gifford that he would be making an actual payment to Buyer A.

Finally, Buyer A stated that he eventually spoke with the Broker of Record at the Brokerage, after Buyer A commenced his small claims action for an unpaid commission rebate. He stated that, in his view, the Broker of Record was uninterested in the commission rebate issues and he declined to discuss the matter.

#### Cross-examination of Buyer A by Mr. Gifford

On cross-examination, Buyer A was asked questions about the rebate he had received in 2007, when he first retained the services of Mr. Gifford. When asked whether he recalled receiving a package of documents from Mr. Gifford for the 2013 transaction relating to the Property, including a BRA, Buyer A advised that he could not recall.

When questioned about the email exchanges he had with Mr. Gifford during the morning of November 13, 2013, and how he (Buyer A) acknowledged in writing that any commission exceeding 2% in commission going to the Brokerage was to have been rebated, Buyer A advised that he did not know that limitation “as a fact”. Then he told the Panel that the whole matter concerning commission rebates was “grey and murky”.

Buyer A testified that he had no recollection of any discussion in February 2013 about commission rebates when he was thinking about moving back to City B. He also stated that no documents were given to him by Mr. Gifford in or about October 2013 indicating anything about a commission or a commission rebate being in the range of \$2500.00 to \$3500.00.

The witness recalled having a discussion with Mr. Gifford about whether the offer price for the Property should be \$720,000.00 or \$725,000.00. He stated (consistent with the email from Mr. Gifford on November 13, 2013) that Mr. Gifford suggested that he leave the price in the offer at \$725,000.00, but he claimed that the registrant never explained the significance of one amount (e.g. \$725,000.00) vs. the other (\$720,000.00).

Buyer A said he did not recall ever stating to Mr. Gifford that the latter had caused him to pay \$5,000.00 more for the Property than he wanted to pay.

There were no questions by way of re-examination from the Prosecutor.

#### Panel questions posed to Buyer A

When referred to Exhibit #3, Tab 5, p. 21, which was a signed Confirmation of Co-operation and Representation for the accepted Buyer A offer and which indicated that the co-operating brokerage would receive a commission of 2%, Buyer A advised that the first time that he raised the issue of the 0.5% in commission coming “out of his pocket” was in his email to Mr. Gifford early in the morning on November 13, 2013. When asked to explain his understanding of that issue, Buyer A claimed that it was not part of the commission rebate understanding he had with Mr. Gifford from the outset but, rather, he meant it to be a “messaging to the other side” in the transaction.

Then Buyer A told the Panel that he agreed that his own email was a “very murky email”. He concluded by stating that he had no written agreement with Mr. Gifford concerning a commission rebate and that he could not recall whether he had any written agreement for a commission rebate when he had dealt with Mr. Gifford in previous transactions.

#### RECO witness – Compliance Supervisor A

Compliance Supervisor A identified himself as a Compliance Supervisor at RECO. He referred to a number of documents that RECO had collected in response to Buyer A’s complaint against the registrant.

With respect to Exhibit #3, Tab 7(A), which was a commission record for the purchase and sale of the Property, Compliance Supervisor A noted that Mr. Gifford received a \$6963.63 commission (inclusive of HST) on the transaction and that notes in the record indicated that Gifford had taken an “advance payment” for that commission. The same document indicates that another agent at the Brokerage also received a substantial share of the commission.

Also, the commission record confirmed that the Brokerage had received a total of \$16,385.00 (inclusive of HST) as the 2% co-operating commission, from which Mr. Gifford, the other agent, and the Brokerage were paid their respective shares of the commission.

Exhibit #3, Tab 11, pp. 22-23, was a Bankruptcy and Insolvency Record search result that confirmed that Mr. Gifford had received an absolute discharge from his bankruptcy in July 2004 based on a bankruptcy which started in February 2000.

There was no cross-examination of Compliance Supervisor A by Mr. Gifford and the Panel had no questions of this witness.

#### Respondent's Witness – Mr. Gifford

In February 2012, Mr. Gifford was contacted by Buyer A requesting his assistance in finding them a house in City A because she and her family were relocating there. He testified that subsequent to that initial contact, Buyer A wanted to deal with the commission rebate issue, at which time Mr. Gifford told him that anything that the Brokerage might receive above 2% would be rebated to the buyer in a successful transaction.

The Property was initially listed in early 2013 for approximately \$900,000.00 but it was, in Mr. Gifford's words, a "fixer upper". After the initial listing eventually expired and the Property was re-listed at \$759,900.00, the Buyer A made an offer for \$700,000.00 which was signed back at \$752,000.00 by the seller. The sign-back was not accepted by the Buyer A.

Mr. Gifford maintained that there was never any discussion with Buyer A that a commission rebate would be paid to Buyer A if the co-operating brokerage's share of the overall commission on a successful transaction was 2% or less. After the Property was re-listed, Mr. Gifford noted that the share to any co-operating brokerage had been reduced from 2.5% (in the initial listing) to 2.0% (on the re-listing).

The registrant claimed that he sent a BRA with some other documents to Buyer A, while acknowledging that he never received a signed BRA from the Buyer A.

Mr. Gifford also testified that he provided something in writing to the Buyer A to confirm that any commission received by his Brokerage over 2% would be rebated to them. However, no such document was produced at the hearing by any party or witness.

With respect to Buyer A's testimony that his wife had run into Mr. Gifford at a bakery after the Buyer A had purchased the Property, Mr. Gifford acknowledged the chance meeting but asserted that he had no discussion at all with Buyer A's wife about any commission rebate. Instead, he advised the Panel that he mentioned that he was "overdue" in providing them with a house-warming gift.

Concerning his encounter with Buyer A in a hardware store, which he acknowledged, Mr. Gifford initially stated the only matter of which they spoke was his intention to visit the Buyer A at their Property and provide the Buyer A with a house-warming gift.

Mr. Gifford denied that he told Buyer A that he was in bankruptcy. Instead, the registrant claimed that he told Buyer A that he was having financial problems and that he was going to meet with a Trustee in Bankruptcy. However, Mr. Gifford said that he did not eventually file for bankruptcy.

Acknowledging that Buyer A raised the commission rebate issue (as evidenced by several emails after the Property deal had closed), Mr. Gifford told the Panel that the issue was always a "non-issue" because there was no rebate payable to the Buyer A given that the Brokerage only received a 2% commission on the transaction for the Property.

With respect to his website outlining that he was willing to provide commission rebates to his clients, Mr. Gifford claimed that he was not aware that the advertisement in question had "followed him" when he changed employers and began working for the Brokerage. The registrant said that he had no idea that the website advertisement was still up and running when he was at the Brokerage.

Mr. Gifford reiterated that he had offered to pay a rebate to the Buyer A if and only if the Brokerage received a commission above 2%. He claimed that Buyer A knew that there would be no commission rebate upon the closing for the Property and that he (Buyer A) confirmed that understanding in his own email on November 13, 2013. In Exhibit #3, Tab 8, p. 48, Buyer A had

written in an email, “For our messaging that 0.5pc reduced commission also comes out of our pocket because anything above 2 would have been rebated.”

Mr. Gifford stated that he also replied to Buyer A with the same understanding a short time later: “I was just surprised to see 2% to cooperating agent...Basically the...5% is the portion that we normally rebate back.”

The registrant asserted that both he and Buyer A knew that the rebate would be zero because of the limited 2% commission payable to the Brokerage and that explained why there was so little email communication on that issue.

Mr. Gifford claimed that Buyer A took more than a year to “stew” over the issue of a rebate and then he unexpectedly demanded a full 1% commission rebate from him.

#### Cross-examination of Mr. Gifford by the Prosecutor

On cross-examination, Mr. Gifford maintained that he emailed Buyer A a document confirming that he would get a rebate if the commission payable to the Brokerage on a successful transaction exceeded 2%. If a 2.5% commission had been payable to the Brokerage as a co-operating brokerage, the rebate to Buyer A would have been \$3,625.00 given the \$725,000.00 purchase price for the Property.

When questioned about his email early in the morning on November 13, 2013 in which he suggested that the rebate payable to Buyer A would be \$2,500.00, the registrant stated that it was a typographical error and that he meant to state that Buyer A would have been entitled to that rebate if things had been different. No elaboration was provided by Mr. Gifford at the hearing concerning how the figure of 2500 had been calculated and any circumstances under which it would have been relevant.

Denying that he owed any commission rebate to the Buyer A, Mr. Gifford stated that if he had believed they were entitled to a rebate he would have simply written them a cheque.

When asked why he did not respond to the many emails sent by Buyer A that raised the commission rebate issue, Mr. Gifford's explanation was that he was very busy during the same period.

He also acknowledged that he received the registered letter from Buyer A in late 2014, prior to being sued in Small Claims Court by the Buyer A.

#### Panel questions posed to Mr. Gifford

As he had testified previously, Mr. Gifford told the Panel that he was not aware that his promotional material on the internet relating to commission rebates was still on his website after he began working for the Brokerage.

The registrant also testified that he had saved his files for the transaction involving the Property but that he could not find the BRA and other documents in the package that he had sent to Buyer A in late October 2013.

He stated that he never received an executed BRA from Buyer A but that was easily explained because there was no motivation for Buyer A to sign such an agreement given that he was not going to receive a commission rebate from the purchase and sale of the Property.

Further, according to Mr. Gifford, once a deal had been signed for the Property on November 13, 2013, there was no benefit to Buyer A to sign a BRA and Gifford confirmed the same to him. In short, there was simply no rebate payable on the transaction because of the limited 2% commission going to the Brokerage.

#### Submissions on findings by the Registrar, REBBA 2002

The prosecutor noted that no one representing the Brokerage had attended the hearing. He emphasized that there was on-line advertising of commission rebates by Mr. Gifford and that such advertising took place in the name of the Brokerage. Further, although the Brokerage in its correspondence to RECO (after the complaint had been made, and after the hearing had been scheduled) advised that it was never aware of any commission rebates being offered by Mr. Gifford, and that there was no trade documentation in its files identifying any such rebates, it

was the Registrar's position that the Brokerage was nevertheless responsible and accountable if Mr. Gifford made promises while employed by the Brokerage.

The prosecutor also stated that the Brokerage had been named as a party in the disciplinary proceeding because the complaint was also against the Brokerage.

With respect to Mr. Gifford, it was submitted that no BRA was ever provided to Buyer A before the Buyer A offer was accepted on November 13, 2013. The prosecutor stated that, as between Mr. Gifford and Buyer A, the latter was a more credible witness on this issue. Also, the documentary record was consistent with no BRA ever having been provided to Buyer A for his review and execution.

As for a commission rebate, the Prosecutor stated that Buyer A was clear and convincing in his evidence that he was expecting a 1% commission rebate upon his successful purchase of the Property in November 2013. The prosecutor argued that if the rebate was *not* going to be 1% then Mr. Gifford had an obligation to confirm the different amount that would be paid.

In short, it was the registrant's duty to clarify and confirm issues relating to the payment (or non-payment) of any commission rebate. According to the prosecutor, the rebate that Buyer A had been led to believe he would receive was "around 1%".

The prosecutor was critical of Mr. Gifford's suggestion that, if things had been different, Buyer A's rebate "would have been" \$2,500.00. It was emphasized that Mr. Gifford's own email on November 13, 2013 indicated clearly "Your rebate will be @ 2500".

Still, the prosecutor conceded that the figure of \$2,500.00 did not itself make sense because if the commission going to the co-operating brokerage had been 2.5%, the 0.5% commission rebate on a \$725,000.00 deal would have been \$3,625.00 not \$2,500.00. The prosecutor stated that the figure of \$2,500.00 did not make sense.

The prosecutor submitted that the fact that Mr. Gifford did not respond to Buyer A's many communications about the commission rebate during most of 2014 showed that he was avoiding his obligation to the Buyer As.

The prosecutor also noted that Buyer A did not know, as was confirmed by the commission sheet, that Mr. Gifford was actually splitting the commission on the transaction with another agent at the Brokerage.

In closing, the prosecutor stated that there were two promises from Mr. Gifford relating to commission rebates that were not kept: (1) an oral promise to pay a rebate of “around 1%”; and (2) a written promise to pay \$2,500.00.

The evidence also clearly established that no rebate was ever paid and that Mr. Gifford’s assertion that none was payable was not credible.

The prosecutor argued that Mr. Gifford failed to properly record his commitments in writing and he did not encourage the Buyer As to enter into a BRA in the transaction for the Property.

To clarify the allegations against Mr. Gifford, they were presented as being threefold:

- 1) No BRA was presented to the Buyer As for their review, which the prosecutor submitted was a breach of the *Code of Ethics*;
- 2) There was an oral promise by Mr. Gifford to pay a rebate of “around 1%” that was never kept; there was a written promise by Mr. Gifford to pay a rebate of \$2,500.00 that was not kept; and
- 3) Commission rebate arrangements and details were not reduced to writing by Mr. Gifford when they should have been.

#### Submissions on findings by Mr. Gifford

Mr. Gifford submitted that Buyer A had provided certain testimony that was simply not true, although he (Gifford) did not elaborate. The registrant stated that he and Buyer A had been friends for many years because of their previous dealings with each other. As a result, Mr. Gifford conceded that he may not have taken the care that he would have ordinarily taken in a transaction because of that friendship.

Mr. Gifford noted that the allegations against him were numerous and very detailed and not easy to understand.

Referring to the emails between him and Buyer A on November 13, 2013, the date when the \$725,000.00 offer was accepted by the seller, Mr. Gifford said that they confirm Buyer A's clear understanding that anything over 2% that was paid to the Brokerage in commission would be payable to the Buyer A as a rebate. However, at the hearing, Buyer A "fudged" his answer when he had been asked to explain his own email.

With respect to the emails (Exhibit #3, Tab 5(D), p. 30) between Buyer A and his wife concerning another agent who offered commission rebates, Mr. Gifford, who was not a recipient of those emails, stated that the first time he ever saw those emails was at the hearing.

In closing, Mr. Gifford advised that his position was straightforward: there was no commission rebate payable to the Buyer A on the transaction because the commission payable to the Brokerage was only 2%.

### **FINDINGS BY THE PANEL**

Having carefully considered the testimony of the witnesses at the hearing, and having reviewed the documentary evidence, the Panel has arrived at the following conclusions:

#### **Allegations against the Brokerage**

The Brokerage and its Broker of Record did not have knowledge of any commission rebates being discussed or offered by Gifford in his dealings with Buyer A. There was no Trade Report or other documentation available to the Brokerage confirming any commission rebate payable to the Buyer A.

Further, there was no evidence presented at the hearing that the Brokerage was aware of on-line advertising with respect to any rebates being offered by Mr. Gifford. In fact, the available evidence indicated that there was a policy or practice at the Brokerage not to permit commission rebates.

The Panel has concluded that that the allegations against the Brokerage in the Allegation Statement were not proven on a balance of probabilities. The allegations are therefore

dismissed. The reality is that most of the time at the hearing was spent dealing with the allegations against Mr. Gifford. It is to that issue that the Panel now turns its attention.

### Allegations against Mr. Gifford

The Panel has concluded that Mr. Gifford's approach to properly documenting matters in the transaction for the Property was sloppy and substandard. Although there is no obligation on the part of a buyer's agent to obtain an *executed* BRA from his or her client, just as there is no power on the part of an agent to compel a buyer to sign a BRA, there is nevertheless an obligation under Section 14 of the *Code of Ethics* to reduce a buyer's agency agreement to writing before the buyer makes an offer and have it signed on behalf of the brokerage and *submit it to the customer for signature*.

Despite the testimony of Mr. Gifford, there was *no* evidence showing that a BRA had been prepared and presented to Buyer A for his consideration and signature before an offer was submitted on the Property.

Although Mr. Gifford claimed he sent a package of documents to Buyer A that included a BRA, he could produce no corroborating evidence for that assertion. The most basic evidence would have been a copy of a covering letter to Buyer A which identified and enclosed a BRA (that had already been executed on behalf of the Brokerage) for Buyer A's review and execution. But none was produced at the hearing.

Buyer A's evidence did not support Mr. Gifford's assertion that he had been provided with an executed BRA for his review and signature.

Mr. Gifford's testimony on the issue of a BRA was disjointed and contradictory. He claimed that he had prepared and sent a BRA to Buyer A, he then asserted that he had a document showing that to be the case but could not produce it, and finally he testified that a BRA was not required in the circumstances because there would have been no incentive for Buyer A to execute a BRA because no commission rebate was payable on the transaction finalized on November 13, 2013.

The obligation in Section 14 of the *Code of Ethics* is not conditional on whether a commission rebate is or is not payable to a buyer in a transaction. BRAs outline the nature of the relationship between the parties and their respective obligations for the real estate services being rendered. It was clear to the Panel in this case that Mr. Gifford failed to comply with Section 14 of the *Code*. In fact, in providing services to the Buyer A, the obligation in Section 14 was simply disregarded by Mr. Gifford. In doing so, he put the Brokerage in breach of the same obligation.

Mr. Gifford's failure to prepare and provide a signed BRA to Buyer A prior to their submission of an offer for the Property also resulted in a breach by him of Section 2.1 of the *Code of Ethics*. His conduct, based largely on what he omitted to do, caused the Brokerage to contravene the *Code*, namely Section 14.

In failing to comply with Section 14 of the *Code of Ethics*, Mr. Gifford did not promote and protect the best interests of his clients, Buyer A, and thus he breached Section 4 of the *Code*. Further, the same breach of Section 14 revealed that Mr. Gifford failed to provide conscientious service to his clients, and it indicated that he did not demonstrate reasonable knowledge, skill, judgment and competence in providing services to Buyer A. As such, Mr. Gifford breached Section 5 of the *Code*.

Given Mr. Gifford's position that he was under no obligation to pay a commission rebate to the Buyer A in the transaction concluded on November 13, 2013, one of the means by which the registrant could have protected himself and the Brokerage on that issue would have been to have a BRA prepared and presented to Buyer A for their signature.

A written BRA would have and should have confirmed the Brokerage's obligations to the buyers, including the circumstances under which a commission rebate was or was not payable. Ironically, Mr. Gifford's failure to comply with Section 14 of the *Code of Ethics* did himself a disservice because it would have provided clear written evidence of any obligation or lack of obligation to pay any commission rebate. The hearing at RECO could have easily been avoided had a BRA been drafted and provided to Buyer A.

Turning now to the principal allegation in the proceeding, whether Mr. Gifford breached the *Code of Ethics* by failing to reduce to writing his obligation to pay a commission rebate to Buyer

A, and by failing to make the rebate payment to his clients, the Panel has determined that those allegations must be dismissed.

The reason for the dismissal of those allegations is simple: there was never any meeting of the minds and binding agreement so far as the payment of a commission rebate was concerned. Indeed, the Registrar's own allegations underscored the uncertainty and vagueness of any obligation on Mr. Gifford's part to pay a commission rebate where the commission payable to the Brokerage upon a successful transaction was only 2%.

One of the features of any binding agreement is *agreement on price* or *agreement on the exact amount of a payment to be made by one party to the other*.

The Registrar's first allegation was that there was an oral commitment by Mr. Gifford to pay a commission rebate of "around 1%" of the total commission payable on a successful transaction for the Property. Even the Registrar could not be more specific than that. The Panel has found that the evidence, on a balance of probabilities, certainly did not support any binding agreement between Buyer A on the one hand, and Mr. Gifford on the other that a rebate of "around 1%" would be paid in the circumstances of the transaction on November 13, 2013.

If the quantum of a commission rebate is not fixed and agreed to by the parties themselves or, alternatively, the parties do not clearly agree to a formula that can be used to calculate the rebate payable and the circumstances in which that formula applies, there can be no binding agreement.

The second allegation made by the Registrar, which must be viewed as an *alternative* allegation because it would not make any sense to say that it "co-existed" with the first allegation, was that there was a written commitment by Mr. Gifford to pay a commission rebate of \$2,500.00 to Buyer A.

The problem with the second allegation is that, using Buyer A's own words, the documentation, including his own email on November 13, 2013, was "grey and murky".

Nothing in the documentation shows any *agreement* between the parties that a fixed amount for a commission rebate would be payable for the deal concluded on November 13, 2013 or,

alternatively, an agreement on a formula to be applied by the parties to calculate a fixed amount.

But, in the Panel's view, the parties did agree on the circumstances under which a commission rebate would potentially be payable: if the commission received by the Brokerage was greater than 2%, the balance would be paid to Buyer A.

In this case, the email from Buyer A himself on November 13, 2013 revealed his understanding as to when any commission rebate would be payable.

Upon being asked by Mr. Gifford whether he wanted to submit an offer at \$720,000.00 (instead of the proposed \$725,000.00), and after Mr. Gifford had explained that the second listing for the Property reduced the commission payable to the Brokerage to only 2%, Buyer A considered the matter, and decided to stick with his offer of \$725,000.00.

He also wrote to Mr. Gifford "for our messaging that 0.5pc reduced commission also comes out of our pocket because anything above 2 would have been rebated."

Buyer A's email is clear evidence that he understood that he would only be eligible to receive a commission rebate if the Brokerage received more than 2% in commission upon his purchase of the Property.

That is also precisely why, after Mr. Gifford advised Buyer A of the reduced 2% commission going to the Brokerage, Mr. Gifford requested Buyer A to consider whether he wanted to reduce the price in his offer for the Property. A reduced price for the Property, if accepted by the seller, would partially offset the fact that no commission rebate was going to be paid.

Buyer A was not a very convincing witness when he was questioned about the language and meaning of his own email on the morning of November 13, 2013. It was no answer to say that the matter and documentation were "grey and murky".

In all the circumstances of this case, especially in light of the documentary evidence, the Panel has concluded that there was no obligation on Mr. Gifford's or the Brokerage's part to pay

Buyer A a commission rebate because the Brokerage's commission was limited to 2% in the deal made on November 13, 2013.

The Panel accepts Mr. Gifford's evidence that the reference in his email that "*Your rebate will be @ 2500* [emphasis added], was a typographical error. Mr. Gifford's reference followed his admonition to Buyer A that "I just noticed that the new listing is only cooperating at 2% instead of \$2.5%."

Mr. Gifford confirming that a payment of \$2,500.00 would be owing on the November 13, 2013 deal would not make any sense given that both parties understood that anything above a commission of 2% going to the Brokerage would be rebated to Buyer A. If a 2.5% commission had been payable to the Brokerage, as would have been the case with a deal under the first listing, Buyer A would have received \$3,625.00 and not \$2,500.00 for a \$725,000.00 offer for the Property.

Buyer A could not explain the rationale behind the alleged \$2,500.00 commission rebate. The Panel agrees that no explanation was offered by anyone simply because there was no agreement between the parties that such an amount would be paid after the deal on November 13, 2013 had been concluded.

The Confirmation of Co-operation and Representation in the accepted offer on November 13, 2013 *confirmed* that the Brokerage would only receive a commission of 2% on the transaction. That document was duly signed by Buyer A although on the wrong signature line at the end of the document. The closing date for the transaction was identified as no later than December 12, 2013.

There was no evidence presented at the hearing that the closing date was extended beyond December 12, 2013.

What happened on or immediately after the closing date with respect to Buyer A requesting the payment of a fixed sum as a commission rebate? Well, nothing happened. There was no demand by Buyer A in late December 2013 or during the first few months of 2014 for any such payment.

By all accounts, Buyer A simply moved into the Property and they seemed content with what had transpired.

However, for reasons not fully explained by Buyer A, he wrote to Mr. Gifford on May 4, 2014 indicating that he was following up on the commission rebate and, in doing so, he requested that Gifford let him know. As noted previously, there was no response from Mr. Gifford to that email.

What is interesting about Buyer A's email is what it does not say rather than what it says. Nowhere in his email did Buyer A identify the *quantum* of any rebate he believed was payable to him. Nor did he outline the basis on which any commission rebate would have actually been payable to him.

If Buyer A believed he was owed a fixed or ascertainable sum as a rebate, one would have expected him to identify in his email the amount owed to him. Instead, he simply stated that he was following up "about the commission rebate" and he requested Mr. Gifford to let him know. Buyer A also noted prior to his request that it had been a "heck of a winter to be running an electric furnace!"

Although Mr. Gifford did not handle the situation well by ignoring the inquiry, his explanation for not answering Buyer A was that he was busy and that he simply understood that he owed nothing to Buyer A.

It was not until September 15, 2014 that Buyer A wrote another email, one as general as his May 4, 2014 email.

In his September 2014 email, Buyer A wrote to advise of the arrival of their new daughter in his family and then concluded by stating "can you please let me know the details of our commission rebate?" That email was certainly not reflective of a person who believed he had a clear and binding agreement with Mr. Gifford to receive a fixed payment.

Again, there was no assertion by Buyer A that a debt in a fixed or ascertainable sum was owed to him by Mr. Gifford or by the Brokerage. If there had been a binding agreement between the

parties, one would have expected Buyer A to have identified the precise amount owed to him and the basis on which that debt was owed.

Instead, Buyer A requested Mr. Gifford to advise him of the “details” of “our commission rebate” almost a year after he purchased the Property.

What emerges from Buyer A’s emails is the sense that he was fishing for a payment from Mr. Gifford many months after the transaction had closed and he was leaving it to Mr. Gifford to propose an amount.

Buyer A’s emails were therefore not from a person who knew the particulars of a binding agreement to pay him a fixed or ascertainable sum. They were emails from someone who was trying to see whether he could extract a gratuitous or voluntary payment from Mr. Gifford well after the transaction had closed.

Also, Buyer A’s emails were *inconsistent* with his stated understanding, as outlined in his own email on November 13, 2013, that a rebate would only be payable if the Brokerage received more than a 2% commission in the transaction for the Property, something which never happened.

There was no response from Mr. Gifford to Buyer A’s September 2014 email, a tactic that did not ultimately serve the registrant’s interests. In fact, Mr. Gifford’s silence in the circumstances only seemed to fuel the ire of Buyer A.

On October 28, 2014, after Buyer A’s wife had apparently met Mr. Gifford at a local bakery, Buyer A wrote that he understood from that chance meeting that Mr. Gifford was going to “confirm the rebate details” and get in touch with him. Thus, by late October 2014, Buyer A was still asking Mr. Gifford to “confirm the rebate details”.

*If there had been* a meeting of the minds and a binding agreement between the parties in November 2013, no details would need to be confirmed by anyone. Indeed, Buyer A would have been in a position immediately upon the closing in December 2013 to calculate how much, if anything, was owed to him and to make a demand for a fixed sum from Mr. Gifford.

The Panel has concluded that Buyer A's own conduct and emails after the transaction closed in December 2013 provide evidence that there was no obligation on Mr. Gifford's part to pay a rebate in circumstances where the Brokerage was only receiving a 2% commission on the transaction.

In his letter, dated November 22, 2014, a copy of which was sent to Mr. Gifford by email on December 1, 2014, Buyer A's vagueness continued. He claimed that "despite a number of promises you have not yet paid us the buyer rebate for that transaction. I have also contacted you on numerous occasions and you have not responded."

Given the emails exchanged between Buyer A and Mr. Gifford before the Buyer As' offer was accepted by the seller late on November 13, 2013, one is hard-pressed to understand what promises Buyer A was talking about.

He certainly avoided making reference to his email exchange with Mr. Gifford on November 13, 2013 where he (Buyer A) clearly acknowledged that no commission was payable if the commission payable to the Brokerage on the transaction did not exceed 2%.

Further, there certainly could not have been any promises from Mr. Gifford *after* the closing of the transaction because he did not respond to any of Buyer A's emails until late 2015.

Buyer A's formal and threatening letter to Mr. Gifford, dated November 22, 2014, once again failed to identify any fixed or ascertainable amount that was owed to him. Instead, he stated vaguely that he would take further action "in respect of the non-payment".

Subsequent emails between Mr. Gifford and Buyer A demonstrate, on a balance of probabilities, that there was, in fact, no meeting of the minds and thus no binding agreement to pay any fixed commission rebate where the Brokerage was only receiving a 2% commission on the transaction for the Property.

In mid-November 2015, Buyer A wrote again to Mr. Gifford, this time advising that Mr. Gifford had assured him in April 2015 that he would make a "payment" to them in the spring or summer of 2015. Once again, there was no mention of any fixed or specific amount to be paid. For his

part, Buyer A never explained why it had taken him six months to write an email to confirm Mr. Gifford's alleged assurance in April 2015 that he would make "a payment".

Mr. Gifford finally responded to Buyer A's emails and asked Buyer A to explain the basis on which he was demanding a rebate as well as the figure that he had arrived at. In response, and for the first time, Buyer A claimed that "our understanding was 1% rebate and that is what we will be seeking."

On November 21, 2015, Mr. Gifford emailed Buyer A and stated, "Buyer A, I am not sure when or how or with whom you arrived at 1% I do know that when we were making the offer of November 13, 2013 you clearly understood it was not." Mr. Gifford forwarded Buyer A's email from the morning of November 13, 2013 to support his statements. In the Panel's view, that should have been the end of the matter.

On November 22, 2015, however, Buyer A responded in an email to Mr. Gifford that, *at a minimum*, Gifford would be obliged to pay the \$2,500.00 he had committed himself to paying in his email, dated November 13, 2013, and he demanded to know whether Gifford was going to make that payment immediately.

Thus, in the span of two days (November 21-22, 2015), Buyer A outlined two very different and inconsistent claims when it came to the quantum of the alleged rebate owed by Mr. Gifford. First it was the equivalent of 1% commission on the transaction, which would have been \$7,250.00. The next day, however, the alleged agreement between the parties was that, *at a minimum*, Mr. Gifford owed him \$2,500.00.

In the Panel's view, Buyer A's inability to identify a consistent fixed or ascertainable amount and the basis on which that amount was payable was clear evidence that there had been no meeting of the minds between the parties.

Providing two very different claims as to the quantum payable was an implicit admission by Buyer A that there was no binding agreement to pay a rebate.

The Panel has relied on the email from Buyer A on November 13, 2013 that confirms his own understanding that no commission rebate would be payable if the total commission flowing to the Brokerage on the transaction was 2% or less.

Buyer A certainly understood that to be the case when he was deciding whether, in the absence of any rebate payable, he was going to lower his price for the Property from \$725,000.00 to \$720,000.00. He ultimately decided not to lower the price in his offer and he ended up purchasing the Property for \$725,000.00.

As a result of the foregoing, the Panel has found that there was no agreement between Mr. Gifford (or the Brokerage) to pay a commission rebate in the circumstances of the successful transaction for the Property on November 13, 2013. The obligation to pay such a rebate would have only arisen if the Brokerage had received more than a 2% commission on the transaction, which was not the case. With no rebate payable in the circumstances, there was, quite frankly, nothing for Mr. Gifford to reduce to writing on that issue.

However, the Panel is mindful that Mr. Gifford did not help himself or the Brokerage in sending emails on November 13, 2013 that were less than clear, and by adopting the strategy of not responding to Buyer A's communications long after the transaction for the Property had closed.

But those facts do not change the fundamental reality that there was no binding obligation or responsibility for Buyer A to pay a commission rebate given the facts underlying the transaction, and Buyer A's own understanding of the same situation, as evidenced by his own email on November 13, 2013.

In the result, the Panel has found that Mr. Gifford breached Section 2(1), 4, 5, and 14 of the *Code of Ethics* because of his failure to prepare and deliver a BRA to the Buyer As which had been signed by the Brokerage.

## **PENALTY**

Counsel for the Registrar, REBBA 2002 is to deliver written submissions to the Panel and to the registrant on the issue of penalty and costs within 15 days of the date on which the Panel's decision and reasons are delivered.

The registrant shall deliver to the Panel and to Counsel for the Registrar, REBBA 2002 its written submissions on penalty and costs in response to Counsel for the Registrar, REBBA 2002's submissions within 15 days of the date on which Counsel for the Registrar, REBBA 2002's submissions on penalty and costs are delivered to the registrant.

Counsel for the Registrar, REBBA 2002 shall deliver to the Panel and to the registrant its reply to the written submission on penalty and costs of the registrant within 5 days of the date on which the registrant's submissions on penalty and costs are delivered to Counsel for the Registrar, REBBA 2002.

If appropriate, submissions on costs and expenses (i.e. disbursements) are to be made with submissions on penalty.

Any inquiries relating to the delivery of the above-mentioned documents should be directed to the Manager, Discipline & Appeals Hearings.

The Panel shall deliver its decision on penalty and costs after considering the written submissions of the parties.

*[Released: December 19, 2017]*



Real Estate Council of Ontario

---

**IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT TO THE  
*REAL ESTATE AND BUSINESS BROKERS ACT, 2002, S.O. 2002, c. 30, Sch. C***

**BETWEEN:**

**REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002***

**- AND -**

**GORDON GIFFORD AND BROKERAGE A**

---

**DISCIPLINE DECISION AND REASONS FOR DECISION**

---

The Panel held a teleconference on March 15, 2018 to discuss the written submissions with respect to Penalty and Costs. The Panel decided as follows:

---

**Gordon Gifford**

**ORDER:**

Successful completion of the “*REIC 2600: Ethics and Business Practice*” course provided by the Real Estate Institute of Canada.

Provide RECO with confirmation of the successful completion of the course within 6 months of sending this decision

**COST AND EXPENSES:** No cost awarded

**Brokerage A**

**ORDER:** Claim Dismissed

**COST AND EXPENSES:** No cost awarded

**REASONS FOR DECISION**  
**PENALTY & COST**

**INTRODUCTION**

The Panel met by teleconference on March 15, 2018 at 2:00 p.m. to review and consider the written submissions of the parties on the issue of penalty. Submissions on penalty and costs were received from the Registrar, Mr. Gifford, and the brokerage employing Mr. Gifford (Brokerage A) to this proceeding.

**PANEL'S DECISION ON PENALTY**

**PENALTY**

After reviewing the Submissions on penalty from the parties, and carefully reviewing the factual and legal findings made by the Panel in its decision from the August 29, 2017 hearing, and applying the established Principles Governing Penalties, the Panel has made the following decision on penalty and costs.

Notwithstanding the very serious allegations advanced against Mr. Gifford by the Registrar in its Allegation Statement, the Panel decided after hearing all of the evidence on August 29, 2017 that, while Mr. Gifford's conduct in the circumstances had been sloppy in the events surrounding his client's purchase of the subject property, it had not been unethical or a breach of the *Code of Ethics* with respect to the more serious allegations advanced by the Registrar. Mr. Gifford had *not* breached his commitment to provide a commission rebate to his client because the parties had not entered into any binding agreement on that issue and, in fact, written evidence from his own client had confirmed there was no such agreement.

However, what was proven on a balance of probabilities at the hearing was that Mr. Gifford had failed to prepare and deliver a Buyer Representation Agreement (“BRA”) to his client prior to an offer being made on the property.

Based on the allegations made at the hearing, the issue of not preparing and delivering a BRA was, for the most part, a tangential or ancillary allegation compared to more serious allegations advanced against Mr. Gifford.

Further, Mr. Gifford’s failure to deliver the BRA to his client did not have a material impact on the transaction and it did not prejudice his client as it related to the alleged commission reduction agreement simply because an agreement was never concluded in the first place.

Despite its lack of success in proving most allegations, the Registrar submitted that an administrative penalty of \$10,000.00 would be appropriate for Mr. Gifford’s breach of sections 2(1) with reference to s. 14, and sections 4 and 5 of the Code of Ethics, as they related to his failure to prepare and deliver a BRA.

The Panel has concluded that such a monetary penalty would be wholly out of proportion to the breach that was found at a hearing that focused on more serious allegations that were not proven. In fact, an administrative penalty of \$10,000.00 would involve penalizing Mr. Gifford for his failure to prepare and deliver a BRA *as if* he had also committed the acts and omissions in the more serious allegations advanced by the Registrar.

The Panel has reviewed the various RECO decisions provided by the Registrar and has determined that an appropriate penalty in this decision, which is proportionate to the breach that has been determined, would be for Mr. Gifford to take Ethics and Business Practice Course offered through the Real Estate Institute of Canada and provide evidence of successful course completion to the Manager, Discipline & Appeals Hearings, within 6 months.

The Panel has also reviewed the submissions on costs delivered by the brokerage (i.e. Brokerage A) for whom Mr. Gifford worked at the material time. The allegations against the brokerage were dismissed by the Panel after the hearing because, quite frankly, there was no evidence to support them. At the hearing, the focus of the Registrar was almost exclusively on Mr. Gifford and his alleged wrongful conduct. No one on behalf of the brokerage attended the hearing. As it turned out, the decision by the brokerage *not* to attend the hearing, which may have been a risky legal strategy, was nevertheless a financially sound one.

After not attending the hearing where the allegations against it were dismissed, the brokerage submitted that it should be entitled to an award of \$25,537.00 in costs from the Registrar.

The Panel, however, is mindful of the requirements to be met in supporting its authority to make an actual award of costs, including section 17 of the *Statutory Powers Procedure Act*. The Panel is not convinced that the Registrar acted in an unreasonable, frivolous, or vexatious manner or in bad faith to support an award of costs in favour of the brokerage. In such circumstances, an award of costs cannot be made.

Although there was a lively, if not salty exchange of pre-hearing correspondence between the brokerage and the Registrar in this case, the brokerage made the decision not to attend the hearing, or participate in the hearing through other means (e.g. videoconference or teleconference), and that decision turned out to be a correct one given the Registrar's failure to prove the allegations that had been made against the brokerage.

The Panel thus finds it unnecessary to provide an analysis of the quantum of costs requested, and the brokerage's entitlement under the Rules to the requested quantum, because of its decision that no costs at all should and can be awarded to the brokerage.

Given the above, the following order is made by the Panel:

- a. The brokerage's request for costs is dismissed; and
  
- b. Mr. Gifford shall take the Ethics and Business Practice Course offered through the Real Estate Institute of Canada and provide evidence of successful course completion within 6 months of sending this decision. Mr. Gifford shall liaise with the Manager, Discipline & Appeals Hearings, in providing proof of his successful completion of the said course within the allotted time.

[Released: April 26, 2018]