

WITHOUT PREJUDICE

IN THE MATTER OF the Real Estate Act, R.S.A. 2000 c. R-5

AND IN THE MATTER OF Richard Garry Oakes, real estate associate broker registered to R&D Realty Inc. o/a Maxwell Canyon Creek at all material times

INTRODUCTION

1. The Executive Director of the Real Estate Council of Alberta (hereinafter "RECA") conducted an investigation into whether the conduct of Richard Garry Oakes (hereinafter "Mr. Oakes"), real estate associate broker registered with Maxwell Canyon Creek at all material times, is deserving of sanction and/or whether he breached the requirements of the *Real Estate Act* (hereinafter "the Act") or the Rules prescribed pursuant thereto (hereinafter "the Rules").
2. The Executive Director and Mr. Oakes agree to resolve all matters against Mr. Oakes on the terms and conditions set out herein.

AGREED STATEMENT OF FACTS

3. Mr. Oakes has a disciplinary history with RECA. On June 2, 2003, he was issued an Administrative Penalty for \$1000 for failing to ensure that the business of his brokerage was carried out competently, contrary to section 21(1)(e) of the *Real Estate Act Rules* (in force from October 1, 1999 to September 30, 2006).
4. J. N. is a real estate associate currently registered with the Maxwell Canyon Creek brokerage. J. N. has been continuously registered with this brokerage since September 18, 1997.
5. On or about June 13, 2006, J.N. listed for sale a residential condominium unit located at #307, 15320 Bannister Road SE, Calgary (hereinafter "the property") through the Maxwell Canyon Creek brokerage. The property was J.N.'s personal residence.
6. In the Listing Agreement for the sale of the property entered into between J.N. and the Maxwell Canyon Creek brokerage, the possession date for the property was set out as:

30 days negotiable

7. On or about June 29, 2006, E. G. and J.G. (hereinafter "the G.'s) through their real estate associate E.L.G. (E.L.G. was registered with the Royal LePage Foothills brokerage at all material times), submitted an Offer to Purchase for the property.
8. On or about June 29, 2006, final acceptance was reached between J.N. and the G.'s. The terms of the Real Estate Purchase Contract (hereinafter "REPC") were:
 - Initial Deposit \$5000
 - New Financing \$254 250
 - Balance Owing \$23 250
 - Purchase Price \$282 500
 - Closing Date August 1, 2006
9. The G's provided the \$5000 initial deposit as required by the REPC. These monies were deposited into Maxwell Canyon Creek's trust account as required by the REPC.
10. On July 7, 2006, the G.'s removed their buyers' conditions. There were no seller's conditions with this REPC.
11. On or about July 14, 2006, J.N. contacted E.L.G. and advised that he needed to extend the possession date to September 1, 2006. The G.'s agreed to this extension.
12. Title to the property was held in J.N.'s name only, however, J.N.'s wife had a dower interest in the property. As such, before title could be transferred from J.N. to another party, Mrs. N. was required to release her dower interest in the property.
13. At the time of the listing for sale of the property and at the time the REPC was entered into between J.N. and the G.'s and conditions were removed, Mrs. N had not released her dower interest in the property. At the time of the listing of the property and at the time the REPC was entered into and at the time conditions were removed, the G.'s were unaware of Mrs. N.'s dower interest in the property and the fact that there was potentially an issue with respect to whether or not she would release her dower interest.
14. On or about August 22, 2006, J.N. contacted E.L.G. to again request that the possession date be further extended. In their conversation, J.N. advised that there was going to be a court hearing on September 8, 2006 regarding the issue of Mrs. N.'s dower interest in the property. After some discussion over the fact that it takes approximately 3 weeks

for title to transfer at the Land Titles office, it was agreed that the possession date would be extended to September 21, 2006.

15. The G.'S were living with relatives as a result of the extensions to the possession date. In order to deal with their concerns in this regard, the following Agreement was entered into between the G.'S and J.N. on September 1, 2006:

The buyer and seller agree to the postponement of the possession date to September 21, 2006 with the following additional conditions:

1. The new possession date of September 1, 2006 is FINAL. As such, the buyer shall take possession of the condo unit on September 21, 2006.
2. The Selling Price is reduced from CAD 282,500.00 to CAD 279,500.00. The CAD 3,000.00 difference will be concluded in a manner of rebate to the buyer and will be executed during the final signing of documents.
3. Should the possession date be postponed again by the seller beyond September 21, 2006:
 - a. The down payment of CAD 5,000 must be refunded and returned without delay
 - b. To compensate for the inconvenience and lost opportunities of the buyer, the seller will write and issue a certified funded cheque no later than September 29, 2006 in favor of the buyer in the amount of CAD 5,000.
 - c. Nothing herein will oblige the buyer to agree to a postponement beyond September 21, 2006. The buyer reserves the right to cancel the transaction if the possession is not available on September 21 and the right to claim damages from the seller.

16. On September 1, 2006, the G.'s and J.N. also signed an Amendment to the Real Estate Purchase Contract form setting out the September 21, 2006 possession date. The form also mentioned the Agreement referred to herein in paragraph 15 by setting out:

Please see agreement

17. On the September 21, 2006 possession date, the G.'S lawyer, W.M., advised the G.'s not to take possession of the property. W.M. was aware that as of this date, Mrs. N. had still not released her dower interest in the property. As well, he had not received the transfer documents to review and he was not advised when these would be forthcoming. As such, he had concerns that if the G.'s took possession and Mrs. N. decided not to release her dower interest, the G.'s would be required to move out of the property and would be unable to take title to it.
18. The REPC required not only possession to be available by the completion date but for title to be transferred free and clear of encumbrances, registrations and obligations except for:

- a) those implied by law;
- b) non-financial obligations now on title such as easements, utility rights-of-way, covenants and conditions that are normally found registered against property of this nature and which do not affect the saleability of the Property;
- c) homeowners association caveats, encumbrances and similar registrations; and
- d) those items which the Buyer agreed to assume in this Contract

Mrs. N.'s dower interest in the proeprty did not fall within these exceptions.

- 19. Mrs. N. did not release her dower interests in the property until October 6, 2006.
- 20. On or about October 10, 2006, J.N. contacted E.L.G. and advised that the transfer documents were now ready and that they would be delivered to W.M.'s law office the next day.
- 21. Upon receipt of the transfer documents, W.M. spoke with the G.'s who confirmed that they no longer wished to proceed with the purchase of the property.
- 22. On October 11, 2006, W.M. wrote to the Maxwell Canyon Creek brokerage requesting a return of the G.'s \$5000 deposit. In this letter, W.M. wrote:

... I confirm on behalf of Mr. and Mrs. G. that they no longer intend to complete the above captioned transaction due to the defaults of the Vendor, specifically his failure to deliver up a Transfer and related documents prior to the closing date, either as originally contemplated, or a contemplated in the "Agreement" dated September 1, 2006, a copy whereof is enclosed for your reference.

Please arrange for the return of my clients deposit to them immediately as it will be required by them in the event they find another property to purchase.

- 23. On October 25, 2006, J.N.'s lawyer, J.D., wrote a letter to the Maxwell Canyon Creek brokerage requesting that the deposit not be returned to the G.'s. In this letter, J.D. also requested that the deposit remain with the brokerage until the matter was resolved. J.D. never suggested in this letter that J.N. was entitled to the deposit outright.
- 24. On November 17, 2006, Mr. Oakes wrote a letter to W.M. in which he set out the following:

The above property has now been sold to another party and title has transferred.

I have in my trust account the deposit by G. of \$5,000.00. The Seller, J.N., has instructed me not to release the deposit back to the Buyer as he is of the belief he is damaged by their non-completion.

G. agreed to purchase at \$282,500.00 and the property subsequently sold to another party at \$263,000.00.

J.N. has informed me that he is considering an action for damages.

25. W.M. responded to Mr. Oakes' letter of November 17, 2006 by way of letter dated December 6, 2006. In this letter, W.M. set out the following:"

I met with my client last evening and advise that unless my clients' deposit funds of \$5,000.00 are returned, by your cheque payable to "W.M. in trust for E.G. et al." by the close of business on Friday, December 8, 2006, my instructions are to take such measures as I deem appropriate to recover same.

The original 'Completion Date' in this transaction was August 1, 2006. At the request of J.N. made July 14, 2006, my client agreed to extend the Completion Date to September 1, 2006. J.N. again, on or about August 22, 2006, requested extension of the Completion Date to September 9, 2006, and then later to September 29, 2006, although this was eventually settled as being September 21, 2006. Throughout this period of time, my clients were given all sorts of excuses by J.N. as to why the Completion Date had to be extended, and were concerned with what would happen if J.N. was unable or unwilling to complete the transaction as of September 21, 2006, and that in any event they receive certain consideration in exchange for agreeing to the extension of the Completion Date to September 21, 2006.

The written agreement of September 1, 2006 provided the financial relief my client requested for agreeing to the extension to September 21, 2006 (\$3,000.00 price reduction) as well as that if the Seller (J.N.) again tried to postpone the 'possession date' beyond September 21, 2006, there would be financial consequences to him, and that in any event the Buyer (G.) was not obliged to agree to any such extension and could cancel the transaction if possession was not available, and could claim damages from the Seller (J.N.).

On September 21, 2006, I advised my client NOT to take possession as we had not received from the Seller (through his lawyer) any Transfer documents, nor even an assurance that same was forthcoming. In fact we were made aware that there was an issue over whether J.N.'s wife would release her Dower Act rights. In these circumstances I was not prepared to have my client incur the expense and aggravation of perhaps moving in to the property and subsequently having to vacate same if indeed J.N. could not furnish us with a registerable Transfer (i.e. one in respect of which his wife had signed off on her Dower rights). Indeed, Mrs. N. only signed off her Dower Rights on October 6, 2006 and J.N.'s lawyer had been previously advised by me that I had told my clients not to take possession, and that in fact my clients were not obliged to proceed with this transaction.

26. By way of letter dated December 8, 2006, J.D. wrote to Mr. Oakes advising that J.N.'s position was that the \$5000 deposit ought to be kept with the brokerage until the matter was resolved. J.D. never maintained in this letter that J.N. was entitled to the deposit.

27. On December 11, 2006, Mr. Oakes wrote to W.M. advising that J.N.'s counsel was suggesting that the \$5000 deposit remain in the brokerage's trust account until the matter was resolved as the brokerage would not deduct any fees for this and asked for a response from W.M.. W.M. never responded to this correspondence.
28. Mr. Oakes never followed up with W.M. or the G.'s after this December 11, 2006 letter.
29. The G.'s never provided consent to Mr. Oakes to have the deposit monies remain in the brokerage's trust account.
30. The deposit monies continued to remain in Maxwell Canyon Creek's trust account until September 18, 2007. On this date Mr. Oakes released the deposit monies to J.N.. Mr. Oakes advises that he did so because he had not heard anything further from the G.'s or from W.M.. He also advised that he had sympathy for J.N. because J.N. lost money in this transaction.
31. Prior to releasing the monies to J.N., Mr. Oakes did not speak with the G.'s or their representatives (W.M. and E.L.G.).
32. At no time did Mr. Oakes seek legal advice.
33. Mr. Oakes never advised the G.'s that he released the initial deposit monies to J.N..
34. The terms of trust with respect to the deposit monies in this real estate transaction were set out in the REPC entered into between J.N. and the G.'s as well as in the Agreement referred to herein in paragraph 15. The terms of trust of set out in the REPC were:

3.5 The Deposits shall be held in trust for both the Seller and the Buyer and shall be:

- (c) refunded forthwith to the Buyer upon the Buyer's cheque clearing the brokerage's trust account if a condition is not waived or satisfied ... or the Seller fails to perform this Contract.

3.7 If there is a dispute between the Seller and the Buyer as to entitlement to the Deposits then:

- (a) the brokerage holding the Deposit shall review the circumstances, determine entitlement and pay the money to the party who is entitled to the Deposit;
- (b) if no reasonable conclusion can be made in regard to (a) above, the brokerage shall notify the parties to

the Contract in writing and shall pay the money into a lawyer's trust account;

35. Mr. Oakes was interviewed by RECA in May 2009 in relation to this matter. During his interview, the RECA investigator showed him the Agreement referred to herein in paragraph 15. Mr. Oakes' response was that he never saw this Agreement and that if he had, he would have released the deposit monies to the G.'s.
36. On October 17, 2007, G.S., then associate broker for Maxwell Canyon Creek, sent RECA the brokerage's file in relation to this matter. As part of the file that was sent, a copy of the Agreement (referred to herein in paragraph 15) was sent to RECA.
37. Mr. Oakes acknowledges receiving the October 11, 2006 letter from W.M. and the December 6, 2006 letter from W.M..
38. On or about May 21, 2009, Mr. Oakes sent a cheque for \$5000 to the G.'s returning their initial deposit.

CONCLUSION

39. By reason of the matters described herein, Richard Oakes' conduct is deserving of sanction in that he:
 - a) Failed to deal with trust monies according to the terms of trust, contrary to section 25(1)(d) of the *Real Estate Act* by:
 - Failing to return the deposit monies forthwith to the G.'s which they were entitled as per paragraph 3.5(c) of the REPC and the Agreement given that J.N. failed to perform on the contract as he was unable to convey title of the property to the G.'s by the agreed upon possession date.
 - Keeping the deposit monies in the Maxwell Canyon Creek's trust account when paragraph 3.7(b) of the REPC required the monies to be paid into a lawyer's trust account in the event of a dispute. Mr. Oakes failed to obtain an express authorization from the G.'s and/or their representative consenting to the deposit monies remaining in the brokerage's trust account given the dispute.
 - b) Failed to ensure that the business of the brokerage as the trustee of the deposit monies in relation to the failed REPC between the G.'s and J.N. was carried out competently and in accordance with the Act, Regulations, Rules, and Bylaws, contrary to section 51(1)(d) of the *Real Estate Act Rules* by:

- Failing to properly review the circumstances when the dispute over the deposit arose.
- Failing to advise the G.'s that the deposit monies were released to J.N. on September 18, 2007

SETTLEMENT TERMS

40. In settlement of these issues, Richard Oakes agrees that he will pay to the Real Estate Council of Alberta a fine in the amount of \$3500 (\$1500 for a breach of section 25(1)(d) of the *Real Estate Act* and \$2000 for a breach of 51(1)(d) of the *Real Estate Act Rules*), together with costs in the amount of \$500.
41. Richard Oakes agrees to complete, within 6 months of the ratification of this Consent Agreement, Section Three of Phase 2 of the REBP program or a similar course at the sole discretion of the Executive Director.
42. Richard Oakes acknowledges that he has been given an opportunity to seek the advice of legal counsel and acknowledges that he is agreeing to the terms of settlement of his own free will.
43. Richard Oakes is aware that a copy of this Consent Agreement will be placed on his file and may be reviewed and considered in any future disciplinary proceedings.
44. Richard Oakes is aware that the Real Estate Council of Alberta may publish the contents of this Consent Agreement.
45. Richard Oakes hereby waives any rights he may have under the *Real Estate Act* or other legislation or otherwise to a review, hearing, appeal, or other judicial proceeding involving the matter referred to herein.
46. These settlement terms are intended to resolve all matters described herein and, subject to the approval of the Hearing Panel, the Executive Director will take no further action under the *Real Estate Act* or before the courts in this regard.

IN WITNESS WHEREOF the undersigned agrees and accepts the terms and conditions of this settlement this 24th day of September, 2009.

Signed and delivered
In the presence of

J.J.
Witness to the signature
of Richard Oakes

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RICHARD OAKES

The Executive Director recommends to the Hearing Panel the proposed terms of settlement based on the Agreed Statement of Facts.

REAL ESTATE COUNCIL OF ALBERTA

V.H.
Witness to the signature
Of Bob Myroniuk

Per:
Bob Myroniuk
Executive Director

Recommendation Approved

✓

Recommendation Denied

DATED at the City of Calgary, in the Province of Alberta this 22nd day of October, 2009.

REAL ESTATE COUNCIL OF ALBERTA

Per: *Cindy Dubray*
Hearing Panel Chairperson

AFFIDAVIT OF EXECUTION

CANADA)	I, J.J. of
)	
PROVINCE OF ALBERTA)	the City of Calgary, in the Province of
)	Alberta
)	
TO WIT:)	MAKE OATH AND SAY:

1. THAT I was personally present and did see Richard Oakes, named in the annexed instrument, who is personally known to me to be the person named therein, duly sign and execute the same for the purpose named therein.

2. THAT the same was executed at the City of Calgary in the Province of Alberta, and that I am the subscribing witness thereto.

3. THAT I know the said party and he is in my belief of the full age of eighteen years.

SWORN BEFORE ME at the City)	
of Calgary in the Province of)	
Alberta this 24 th day of)	
September, 2009.)	
)	J.J.
)	(signature of witness)
)	
)	
C.S.)	
A Commissioner for Oaths in and)	
for the Province of Alberta)	