

10-2-03

IN THE MATTER OF THE *Real Estate Act*, S.A. 1995, c. R- 4.5

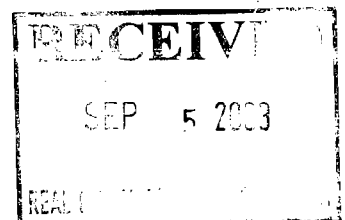
AND IN THE MATTER OF PATRICK O'DONNELL, BROKER,
REGISTERED WITH CLASSIC REAL ESTATE LTD.

INTRODUCTION

1. The Executive Director of the Real Estate Council of Alberta conducted an investigation into whether the conduct of Patrick O'Donnell (hereinafter "Mr. O'Donnell"), Broker, registered with Classic Real Estate Ltd., 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") or the Code of Conduct prescribed pursuant thereto (hereinafter "the Code of Conduct").
2. The Executive Director and Mr. O'Donnell agree to resolve all matters against Mr. O'Donnell on the terms and conditions set out herein.

AGREED STATEMENT OF FACTS

3. On September 15, 2000, M.D. and L.D. (hereinafter "the D.'s ") listed their mobile home with agent M.B. _____, of Classic Real Estate Ltd.
 - (a) Under clause 9.3 of the listing contract, the provision concerning mortgage assumption was ticked "no". The parties agree that there was not much discussion concerning this provision at the time the listing agreement was signed.
 - (b) The provision under clause 9.3 concerning whether the mortgage was CMHC-insured was also ticked "no", notwithstanding that this was not the case.
4. On September 30, 2000, the license of 2000 Classic Real Estate Ltd. o/a Realty World Classic was terminated, and on October 1, 2000, 883813 Alberta Ltd. o/a Realty World Classic was established.
 - (a) Mr. O'Donnell, former owner/broker of Classic Real Estate Ltd. o/a Realty World Classic, remained as broker for 883813 Alberta Ltd. o/a Realty World Classic.
 - (b) Both M.B. _____ and B.W. _____ previously registered with Classic Real Estate Ltd., registered their agent licenses with 883813 Alberta Ltd. on October 1, 2000.



- (c) Brokerage clients were not notified of the brokerage change and contracts were not amended to reflect the change.
5. In January 2001, B.W. submitted a purchase contract to Mr. O'Donnell, acting on behalf of M.B. who was on holidays, to present to the D.'s .
- (a) The contract listed B.W. and his wife, C.W. [("W.'s")] as purchasers. While B.W. position as a licensed agent was noted in the purchase contract, his position as an agent with the brokerage in question, Classic Real Estate Ltd., was not also disclosed in writing.
 - (b) The contract provided for a purchase price of \$133,500, to be paid by assumption of the D.'s ' \$110,000 mortgage and \$23,500 in the form of a second mortgage supplied by an individual named R.B.
 - (c) The D.'s were informed about the secondary financing but not the identity of R.B.
 - (d) The D.'s initially accepted the offer, but later withdrew their acceptance upon learning from their lawyer the risks of allowing their CMHC mortgage to be assumed.
 - (e) An attempt to salvage the deal by having both the W.'s and Realty World Classic indemnify the D.'s in the case of any losses connected with the mortgage assumption fell through, as Realty World Classic was not prepared to enter into such an arrangement.
 - (f) The W.'s released the D.'s from the contract without penalty.
6. In February 2001, submitted a new offer to the D.'s with R.B's named as purchaser. B.W. was identified as R.B's agent.
- (a) The contract provided for a purchase price of \$133,500, with a \$2,000 initial deposit, \$113,475 in new financing, and \$18,025 owing.
 - Negotiations concerning the purchase price apparently commenced with an offer by R.B of \$128,000. While the amount of the subsequent counteroffers are unclear, the amount of \$133,500 was eventually settled on.

- (b) Upon noticing B.W.'s designation as purchaser's agent, the D.'s asked M.B. if R.B. had been given information about the first offer.
- M.B. advised the D.'s that this was not the case. M.B. stated that she did not ask B.W. what, if anything, he told R.B. and that she assumed he would not say anything relating to the price because of the dual agency situation.
 - B.W. stated M.B. did ask him whether R.B. was aware of the original purchase price and that he had said "no." B.W. did not remember whether this conversation occurred before or after negotiations were completed.
 - B.W. stated further that, "Some time after this, [M.B. inquiry] I realized I was in error and informed M.A.B. (the new owner of the brokerage) that R.B. had to have known what the price was because he was the potential holder of the second mortgage."
- (c) Prior to the purchase, B.W. made arrangements with R.B. to rent the property until such time as he would assume the mortgage and take title, which arrangements were not disclosed to the D.'s. B.W.'s intended mortgage assumption and purchase did not materialize.
- B.W. stated he had spoken to Mr. O'Donnell about the arrangement and Mr. O'Donnell did not feel that disclosure was necessary because B.W. was not buying the property
 - Mr. O'Donnell stated that he did not feel that B.W.'s plan to rent the property and to eventually assume the mortgage was relevant to the seller and necessary to disclose. Mr. O'Donnell stated that he didn't feel B.W. had a "material interest in the property" so that it was necessary to disclose the information. Mr. O'Donnell also stated he thought it would be a breach of dual agency if they told the sellers about B.W.'s intention to move into the property following the purchase.
- (d) The D.'s discovered upon closing that B.W. was moving into the property and believed they had been deceived as to the role of R.B. and the identity of the true purchaser.

7. In the February 2001 purchase contract between R.B. and the D.'s :

(a) Clause 13.2, concerning the length of time the offer or counteroffer was open, was not completed.

- B.W. related that, as a matter of practice, he does not complete this clause, and did not realize this was a problem.
- M.B. did not know why clause 13.2 had not been completed.
- According to Mr. O'Donnell, it is his general practice not to complete clause 13.2 when clients are out of town (the D.'s were living in Edmonton), to prevent the offer from becoming "void".

(b) B.W. pre-signed as a witness for R.B.'s wife, who did not end up signing as co-purchaser.

- B.W. stated he does not really understand the requirements for witnessing signatures, and that he thought it was fine to witness a signature without being present when the individual signed. B.W. also stated that he often completes "witness faxes", where contracts are faxed off to be signed and he later witnesses the signature(s).
- According to Mr. O'Donnell, he understood that as long as one could verify that a signature belonged to a signatory, one could sign as a witness. He stated that he had not understood that one had to actually see the individual sign the document.

(c) The D.'s signatures had not been witnessed.

- M.B. did not notice that the D.'s signatures had not been witnessed.
- Mr. O'Donnell stated that, while it is his policy to "look at all contracts" and it is office policy that all contracts be written out appropriately, he does not know if he examined every file after he sold the business. He stated that, had he looked over this file, he would have noticed that the signatures weren't properly witnessed and would have had his agents deal with the problem immediately.

- (d) No dual agency disclosure form was signed by R.B.
- B.W. stated that he believes he discussed the issue with R.B., but does not recall if he had R.B. sign a dual agency disclosure form.
 - Mr. O'Donnell stated that, had he looked over this file, he would have missed the dual agency disclosure and would have had his agents obtain the required documents.

CONCLUSION

8. By reason of the matters described herein, Mr. O'Donnell's conduct is deserving of sanction in that he committed the following breaches:
- (a) one breach of Code of Conduct section 2(e), by breaching his fiduciary duty to disclose a conflict of interest;
 - (b) one breach of Rule 21(1)(c), by trading in real estate other than in the name of a registered brokerage;
 - (c) one breach of Rule 21(1)(e), by failing to ensure that the business of the brokerage was carried out competently and in accordance with the *Real Estate Act*, the Bylaws, and the Rules.
 - (d) One breach of Rule 21(1)(f), by failing to ensure an adequate level of supervision of agents within the brokerage.

SETTLEMENT TERMS

9. In settlement of these issues, Mr. O'Donnell will pay immediately to the Real Estate Council of Alberta a fine in the amount of \$5,000.00, together with costs in the amount of \$500.00.
10. Mr. O'Donnell agrees that as a condition of his authorization to trade in real estate, he will, within six (6) months of ratification of this Agreement by the Hearing Panel, successfully complete the "Ethical Practice in Real Estate" course offered by the Alberta Real Estate Association, or a similar course at the sole discretion of the Executive Director. The credits obtained in the course will not be applied to the mandatory education course credits required by RECA.
11. Mr. O'Donnell 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.

12. Mr. O'Donnell is aware that a copy of the Consent Agreement will be placed on his file and may be reviewed and considered in any future disciplinary proceedings.
13. Mr. O'Donnell is aware the Real Estate Council of Alberta may publish the contents of this Consent Agreement.
14. Mr. O'Donnell hereby waives any rights he may have under the Act or otherwise to a review, hearing, appeal or other judicial proceeding involving the matter referred to herein.
15. 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 Act or before the Courts in this regard.

IN WITNESS WHEREOF the undersigned agree and accept the terms and conditions of this settlement this 3 day of September, 2003.

Signed and delivered
in the presence of

"I.R."

Witness to the signature
of Patrick O'Donnell

)
)
)
)
)
)
)

"Patrick O'Donnell"

PATRICK O'DONNELL

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

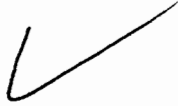
REAL ESTATE COUNCIL OF ALBERTA

"S.C."

Witness to the signature
of Bob Myroniuk

Per: "Bob Myroniuk"

Bob Myroniuk
Executive Director

Recommendation Approved 

Recommendation Denied _____

Emmerton
DATED at the City of Calgary, in the Province of Alberta this 25 day of Sept, 2003.

REAL ESTATE COUNCIL OF ALBERTA

Per: "Lorne Clark"

Hearing Panel Chairperson

AFFIDAVIT OF EXECUTION

CANADA) I, I.R. _____ of
) (name of witness),
 PROVINCE OF BRITISH) the City of WEST VANCOUVER in the Province
 COLUMBIA) of British Columbia,
)
 TO WIT:) MAKE OATH AND SAY:

1. THAT I was personally present and did see Patrick O'Donnell 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 in the City of WEST VANC., in the Province of British Columbia, 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 in the City)
 of W. VANC., in the Province of)
 British Columbia this 3 day of)
SEPTEMBER, 2003.)

"I.R."

(Signature of Witness) _____

"J.R."

A Commissioner for Oaths in and)
 for the Province of British Columbia)