



Real Estate
Council of Ontario

**IN THE MATTER OF AN APPEALS HEARING HELD PURSUANT TO THE
*REAL ESTATE AND BUSINESS BROKERS ACT, 2002***

BETWEEN:

REAL ESTATE COUNCIL OF ONTARIO

- and -

BELLA LEE

APPEALS DECISION AND REASONS FOR DECISION

APPEARANCES:

For the Registrant:

Matt Mulholland for Bella Lee
Cameron Forbes for Registrant A

For the Real Estate Council of Ontario: Shane Smith

Heard in Toronto:

June 15, 2021

FINDINGS:

The Appeal from the Discipline Committee is allowed in part. The Penalty Decision of the Committee is varied to read as follows:

Bella Lee is ordered to pay a fine of \$15,000, payable to RECO within 90 days of notification of this Decision.

The remainder of the Discipline Committee's decision has been upheld, such that:

Bella Lee is ordered to successfully complete the classroom courses "REIC 2600: Ethics and Business Practice" course and REIC 2280: Legal Issues in Real Estate" provided by the Real Estate Institute of Canada and Bella Lee is to provide RECO with confirmation of successful completion of these courses within 180 days of notification of this decision.

COSTS AND EXPENSES:

If the parties cannot agree on costs, written submissions by each party not exceeding three (3) double-spaced

pages may be filed with RECO within ten (10) days of the release and delivery of these Reasons. Thereafter, the Appeal Panel will advise the parties of its decision on costs.

WRITTEN REASONS:

REASONS FOR DECISION

This is an appeal pursuant to the Real Estate and Business Brokers Act, 2002 (“REBBA 2002”) from the decisions of a panel of the Discipline Committee (the “Panel”) released October 25, 2018 (“Discipline Decision”) and March 12, 2019 (“Penalty Decision”).

Background

In the Discipline Decision, the Panel found that Bella Lee (“Lee”) and Registrant A (collectively the “Appellants”) had violated sections 3, 37, 38 and 39 of the *Code of Ethics*. In the Penalty Decision, each of the Appellants was ordered to pay a fine of \$25,000.00 and to complete two classroom courses administered by the Real Estate Institute of Canada, being REIC 2600, *Ethics and Business Practice* and REIC 2280, and *Legal Issues on Real Estate*. The Appellants were also directed to provide confirmation of their successful completion of the courses within 180 days of the Penalty Decision. The Appellants seek to set aside the decisions of the Panel on the basis that it made the errors enumerated in the Notice of Appeal.

This proceeding arose from a complaint alleging that the Appellants had misled the Complainant that the Buyers (which included the Complainant) were competing against multiple offers to purchase the property at 1-A Street, City A (“Property”) when, unbeknownst to them at the time, there were no competing offers.

The Appellants contended that Panel erred in finding that they had misled the Buyers and their agent. It was also submitted that the Panel erred in concluding that the misconduct of one of the Appellants could be attributed to the other. Finally, the Appellants contended that the penalty imposed was improper or, alternatively, it was unreasonable in the circumstances. The Appellants

also argued that the Panel had made unreasonable findings of fact and had breached its duty of fairness to them, with the result that the decisions on liability and penalty should be overturned. The Registrar, as the Respondent on the appeal, maintained that the Panel's decision and penalty were correct, such that the appeal should be dismissed with costs.

The Facts

In the transaction involving the Property, the Appellants had acted for the sellers; in doing so, they had arranged an offer presentation. Two agents acting for two sets of prospective buyers attended at the Appellants' office with a view to presenting offers to the sellers. The Buyers, the Complainant Buyer A and her husband were represented by Representative B. They signed an initial offer for the Property for \$2,806,000.00, which was subject to certain conditions.

Also, in attendance were other potential buyers, who were represented by Representative C. The two sets of buyers sat in separate private rooms while at the Appellants' office. Representative C's clients prepared an offer for \$2,960,000.00, which was subject to various conditions. However, their offer was not actually signed. Registrant A met separately with Representative C and his clients, and Representative B and the Buyers, to explain the presentation procedure.

The Buyers' evidence was that they were, at all material times, advised that they were in a competitive offer situation and, as a result, they believed that to be the case. In contrast to the Buyers' narrative, the Appellants asserted that the Buyers became aware *prior to* making their offer that there was no competitive bidding in the circumstances.

The evidence of the Buyers was that, prior to their offer, Registrant A had advised them that the other buyers had made an offer of \$3,088,000.00, without conditions. However, as it turned out, no competing offer had, in fact, been submitted. The Complainant, who was one of the Buyers, also alleged that, as a result of being advised they were in a competitive bidding situation, the Buyers increased their initial offer, and made it unconditional, which offer was ultimately accepted by the sellers.

Submissions of Bella Lee

Mr. Mulholland, counsel for Lee, submitted that the Panel's finding was unreasonable including its decision that multiple sections in the Code of Ethics had been breached, on the basis that the evidence had not shown that the Buyers had been told that they were bidding for the Property in competition with other buyers. The Appeal Panel notes that sections 37 and 38 of the Code of Ethics are broadly worded and they require a registrant to take care not to make inaccurate statements during trades in real estate. That obligation is not simply designed to protect one's own clients but also other persons involved in a transaction. Those sections read as follows:

37. (1) A registrant shall not knowingly make an inaccurate representation in respect of a trade in real estate. O. Reg. 580/05, s. 37 (1).

(2) A registrant shall not knowingly make an inaccurate representation about services provided by the registrant. O. Reg. 580/05, s. 37 (2).

38. 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. O. Reg. 580/05, s. 38.

Mr. Mulholland conceded that credibility had been a significant issue during the discipline hearing. He directed Appeal Panel's attention to certain factors which he claimed went to credibility, the misapplication of which resulted in faulty conclusions by the Panel. For its part, the Panel had found that there was "no reason to doubt the credibility of the evidence of the Complainant or the evidence of Representative B and [that the Panel] accepts that evidence which establishes that they were told that this was a multiple offer situation. Neither witness had any reason to fabricate their evidence (*p.22, Discipline Decision*)". Mr. Mulholland argued that the Reasons of the Panel were inadequate in accepting and explaining that evidence and supporting the Panel's conclusion that it warranted the Appeal Panel setting aside the Panel's decision.

Mr. Mulholland also argued that the Panel ignored relevant credibility issues in reaching its conclusions. In particular, he referred to the testimony of the Complainant which he asserted was illogical. That evidence is reproduced in part as follows:

179. Q. And you'll agree with me that it doesn't make a lot of sense that you would put in an offer for less than the offer you were being told already existed.

A. That is actually the key issue here, the only problem. Because back then they received the offer from us, which is \$2,806,000 with conditions and they also had another offer which is \$3,088,000 without conditions.

(Complainant's testimony, p. 62, Transcript)

Mr. Mulholland pointed out that the Complainant also had concerns about the conduct and credibility of her own agent, Representative B, who had the most to gain from the transaction. Another challenge in the appeal was that the Panel had not sufficiently dealt with the issue of why - in the face of the "fictional" competing offer of \$3.088 million -- the Buyers would have believed that their increased offer to \$3 million would have been considered sufficient by the sellers. Mr. Mulholland also submitted that Representative C's evidence at the disciplinary hearing had not been given sufficient weight by the Panel.

Submissions of Registrant A

Mr. Forbes, counsel for Registrant A, submitted that the Panel's decision had been based on an unreasonable analysis of the evidence. His submissions emphasized the circumstances underlying the Buyer's acceptance of the terms of the agreement, suggesting that the Panel did not consider whether there was a financial incentive for the Buyers to have engaged in the conduct which was the subject of the complaint. The credibility of Buyer A was of concern to Mr. Forbes, who suggested that the Panel had failed to consider the conflicting versions of the interaction between Buyer A and Representative B, as recounted at the disciplinary hearing. Mr. Forbes suggested that such evidence had adversely affected the Complainant's credibility and that the Panel had failed to consider that reality in reaching its conclusions. The credibility of Representative B was also addressed in submissions. It was suggested that the Panel had erred by assuming that Representative B had "no reason to fabricate any evidence" and by ignoring the manner in which his evidence had been collected.

Submissions Regarding the Penalty

Both Appellants submitted that the Panel, in imposing penalties of \$25,000.00 against each of them, breached its duty of fairness and that the breach is reflected in the Panel's reasons, in its treatment of the evidence before it, and in not dismissing the complaint. It was the Appellants'

submission that since the Panel's decision on liability was founded on error, it was a further error to impose any penalty at all.

The Appellants further argued that the severity of the penalty was not justified, having regard to the factual conclusions reached by the Panel and to the factors to be considered in existing RECO decisions to be applied. Referring to *RECO v. Suzette Thompson*, the Appellants argued that the factors to be considered in determining penalty, although appropriate, were not reasonably applied and, further, that the penalty exceeded the range of sanctions in similar cases.

Submissions of the Respondent

On the behalf of the Respondent, the Registrar, Mr. Smith submitted that the standard of review on appeal from the Panel's decision is reasonableness and, accordingly, that standard is high and it should result in considerable deference to the Panel. He added that a civil standard of proof is applicable in this proceeding and that increased deference should be given to the Panel where credibility issues had played an important role in the disciplinary hearing. Mr. Smith argued that, on the whole, the Reasons of the Panel demonstrate that the Panel appreciated all of the evidence before it and that no errors had been made in recounting the evidence and determining the significance of key facts.

The Appeal Panel's Analysis

In reviewing the record, and the Discipline Decision of the Panel, and upon considering the submissions of the Parties, the Appeal Panel is satisfied that the Panel's Decision should not be set aside. The Panel was justified in coming to the conclusions it reached based on the evidence that was before it, and that would include the credibility determinations made by the Panel.

Although the Appellants maintained that the Panel erred in concluding that the Complainant was justified in believing she was in competition with another buyer in a multiple offer situation and that the Appellants had misrepresented that situation to her, there was sufficient evidence to support the Panel's finding. Further, the Appeal Panel is not convinced that the Panel disregarded

evidence that would have negated its conclusion or caused the Panel to make errors in assessing the credibility of witnesses.

Prevailing legal principles entitle the Panel to significant deference in its findings of fact, including questions of credibility. Unless the Panel could be shown to have committed a palpable and overriding error or made findings of fact that were clearly wrong, unreasonable, or unsupported by the evidence, its decision on liability should not be disturbed.

Iacobucci, J. in *Housen v. Nikolaisen* [2002] 2 S.C.R. 235, speaks to the deference an appeal court is to give to the finder of fact. At paragraph 10, the Court states:

The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a “palpable and overriding error”: *Stein v. The Ship “Kathy K”*, [1976] 2 S.C.R. 802, at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12, at para. 42; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 57. While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.

In *F.H. v. McDougall* [2008] 3 S.C.R. 41, Rothstein, J., addressed the issue of challenging findings of credibility at the appellate level:

Assessing credibility is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility.

It was the function of the Panel to assess credibility and, absent clear evidence of error or defects in the process below, findings of credibility are not to be interfered with except in very limited circumstances. This is not one of the cases where the Appeal Panel should intervene.

In matters of mixed fact and law, significant deference is also to be given to the Panel. The law as expressed in *Vanderburg v. RECO* 2007 is that the Legislature intended that disciplinary decisions be reviewed by Appeal Panels applying a standard of reasonableness *simpliciter*. Cunningham, A.C.J.S.C. for the Divisional Court states:

In my opinion, the Legislature intended disciplinary decisions of RECO’s Membership Appeals Committee to be reviewed on a standard of reasonableness *simpliciter*. The decision should only be overturned if it was unreasonable.

In *Ryan v. Law Society (New Brunswick)*, [2003] S.C.J. No. 17, Justice Iacobucci, in discussing the function and application of appellate review of administrative decisions, states:

Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of its enabling statute, and the nature of the question in dispute all suggest a more deferential standard of review than correctness. These factors suggest that the legislator intended that the Discipline Committee of the self-regulating Law Society should be a specialized body with the primary responsibility to promote the objectives of the Act by overseeing professional discipline and, where necessary, selecting appropriate sanctions. In looking at all the factors as discussed in the foregoing analysis, I conclude that the appropriate standard is reasonableness simpliciter. Thus, on the question of the appropriate sanction for professional misconduct, the Court of Appeal should not substitute its own view of the “correct” answer but may intervene only if the decision is shown to be unreasonable.

In reaching its conclusions in this case, the Panel accepted the evidence of RECO over the Appellants’ evidence. Such findings of fact are not to be reversed unless the Panel has made a palpable and overriding error. Once again, that did not happen here.

The Appellants’ Notice of Appeal questioned a number of findings of fact made by the Panel. Concerning the finding that the Buyer (Complainant) understood that she was in a multiple offer situation, the record indicates that her testimony and that of her agent, among others, was not consistent with the Appellants’ version of events. The Panel was within its right to choose the Buyer’s evidence over that of the Appellants.

71. A. So we were told that we were each to present the offer. So basically after we present the offer and we were told that there was a full price offer. So basically we were told we're in a situation of we need to come the higher price. We were aware that we are in for a situation that we need to compete. And we were told that minimum price we have to offer is in three million.

72. Q. Now what then did you do?

A. So after that Registrant A left and my husband, Representative B and we had discussion. I asked Representative B about the marketing price of this property, how much is that.

73. Q. And what did Representative B tell you about that?

A. So he told me that market price for this property would be around \$3,030,000 to \$3,050,000, in that range. I was advised that because just two hours before that he had told me a different price which is the price we put in offer, that is \$2,806,000.

74. Q. Okay. So now he told you it could be higher. Then what did you do after he told you that?

A. Because we were told that we were in a competition and also told there was a full price offer on no condition. So we felt like we didn't have chance.

75. Q. Okay. And then you did what after that?

A. So since we (indecipherable) to the offer condition and also we were told (indecipherable) so we sent the offer. So we present another offer (indecipherable) and we felt like we don't have a chance -- we didn't have a chance with them. Because we felt that there was a big difference between that \$2,806,000 and 3,000,000. And because the other offer presented was very high, so we didn't expect any chance.

(Buyer A’s testimony, pp. 36- 37, Transcript)

519. Q. And then what happened? So you're told the offer wasn't good enough.

A. And then we were told that there was an offer for full price without condition.

520. Q. And what did you do when you told her?

A. And I discuss with Buyer A and I told her that that offer -- yeah, because she was thinking there, said that we may not get this property without increase the price.

521. Q. Yes. And then?

A. And then she told me that I need to think about this. And in the meantime I think I wrote the full price on the offer.

(Representative B's testimony, pp. 141-142, Transcript)

793. Q. And you did not see any written offer?

A. No.

(Seller A's testimony, pp. 200, Transcript)

969. Q. Okay. So if -- in your testimony you said today, that to you what was happening around that time was not a multiple offer situation, is that right?

A. Yes.

970. Q. If you look at paragraph 6 at page 3, you said with these two offers we had an offer presentation with the sellers. So -- and that the first buyers, Buyer A and Buyer B, and the buyer's agent Representative B, at 7:30 p.m., the listing broker Bella Lee and Registrant A, that is you, that you explained to the buyer's agent, Representative B, the procedure for the multiple offer presentation. Today you say in your mind it wasn't a multiple offer but a month after that you explained the rules of a multiple offer. Which one is right?

A. Today was the right.

971. Q. The right one. So what you said (indecipherable) and today's is the right one?

A. Yes.

972. Q. So there was no multiple offer situation at all?

A. No.

973. Q. So when you signed this document on September 22nd, you didn't read it before you signed it?

A. I sign it but it was a mistake.

974. Q. So can I say we should disregard everything you said there and just believe on what you remember now?

A. But just going -- was mistake, but today was the truth.

(Lee's testimony, p. 235-236, Transcript)

1033. Q. You said with these two offers we had an offer presentation with the sellers, that's right?

A. Yeah.

1034. Q. But in fact there was not two offers at all.

A. This is our response to RECO.

1035. Q. Were there two offers?

A. It was two offer register.

1036. Q. Did you receive two written offers?

A. No.

(Registrant A's testimony, p. 256, Transcript)

Having regard to the entire record, the Appeal Panel finds that the Panel made the Discipline Decision based, in part, on an assessment of the credibility of the witnesses and, as such, the circumstances do not support the Appeal Panel varying or setting it aside.

In *F.H. v. McDougall*, [2008] SCR 41, Rothstein, J., in discussing the trial judge's role in assessing credibility, states:

Assessing credibility is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility. As explained by Bastarache and Abella JJ. in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, at para. 20:

Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

In *Housen v. Nikolaisen*, [2002] 2 SCR 235, Iacobucci and Major, JJ. state:

The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

The Panel also found that the Appellants inaccurately represented to the Complainant that there were multiple offers for the Property when, in fact, there was only the offer from the Buyers. The Appellants, of course, disagree and maintain that the Panel erred. However, the record indicates otherwise and does not support the grounds of appeal raised by the Appellants. See Lee's testimony at p.235 and Registrant A's testimony at p.256 of the Transcript, *supra*.

In its Discipline Decision, the Panel details the evidence of all of the witnesses. There has been no compelling argument regarding the alleged inaccuracy of the Panel's description of that evidence. In *F.H. v. McDougall*, Rothstein J. discussed findings of credibility in judicial decisions:

[100] An unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at (see *Gagnon*). But that does not make the reasons inadequate. In *R. v. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51, released at the same time as this decision, McLachlin C.J. has explained that credibility findings may involve factors that are difficult to verbalize:

While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge in saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence in convicting him,

but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization. [para. 49] Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been.

Given that the Panel considered all the evidence, and thus came to a decision having regard to a robust record before it, the Appeal Panel is not convinced that the Discipline Decision was unreasonable or that there were defects in its reasoning or evidentiary assessment such that palpable and overriding errors of facts were made. As such, the Panel's decision on the issue of liability should not be disturbed.

The Penalty Decision

As part of the appeal, the Appellants submitted that the Panel had erred in imposing any penalty in the circumstances. That submission was based on the alleged errors in the Panel's decision on liability. The Appellants argued that to impose a significant penalty on *both* Appellants was unreasonable. We disagree. Throughout their testimony at the disciplinary proceeding, each of the Appellants described their relationship as a partnership and that, in their real estate activities, they act as a "team". It was not unreasonable for the Panel to impose the same penalty on each of them.

The Appellants further argued that the amount of the penalty was not justifiable, claiming it was too severe having regard to the facts and based on existing case law. By contrast, the Registrar argued that the penalty imposed on each Appellant was fair and that it should not be interfered with.

The Panel is ordinarily owed deference on the issue of penalty and the Appeal Panel should not intervene unless its decision has been unreasonable.

The Panel provided reasons in support of its Penalty Decision. That decision included reference to the many factors in *RECO v. Suzette Thompson*. In doing so, regard was had to the nature and gravity of the Appellants' breaches of Code of Ethics, the impact of the conduct on the complainant, the role of the Appellants in the breaches and whether the Appellants personally gained as a result.

Other factors considered by the Panel were the need for specific deterrence and general deterrence, the need to maintain public confidence in the integrity of the profession, and the degree to which the Applicant's breaches are regarded as being outside the range of acceptable conduct. Lastly, the Panel considered the range of sanctions in similar cases. In particular the Panel considered the cases of *RECO v. Amendola* and *RECO v. Batston* in which the breaches were similar to the case before it.

The Panel also noted that market circumstances had changed since *Amendola* and *Batston* and similar cases had been decided. Equally important, the maximum fine which can now be imposed by a Panel has increased from \$25,000.00 to \$50,000.00, that is, for proceedings commenced under the new penalty regime (which regime post-dates this case).

In its Penalty Decision, the Panel observed that there "is no question that real estate prices throughout the province having significantly increased over the years and correspondingly commissions have also significantly increased. The Panel feels that, as a result, the penalties for breaches of the Code of Ethics should also significantly increase."

Although the Panel was entitled to take judicial notice of the increase in real estate prices and commissions in recent years, the Appeal Panel has concluded that it was unreasonable for the Panel to have relied on such circumstances to impose a maximum penalty of \$25,000.00 in this case; relying on that factor to push the imposed penalty to its limits was arbitrary and unwarranted. Further, the increase in the statutory jurisdiction of Panels to impose more significant penalties for cases falling under the new penalty regime cannot be used by a panel to support higher penalties for cases subject to the former regime. The factors in *RECO v. Suzette Thompson* should be crucial to a disciplinary panel's analysis of the facts after a determination on liability.

Having considered the record from the disciplinary hearing, as well as the Discipline Decision, the Appeal Panel has determined that the factors in *RECO v. Thompson*, and the requirements of doing justice in this case, are best served by preserving the education component of the Panel's Penalty Decision. However, the monetary penalty for *each of* Lee and Registrant A should be reduced

from \$25,000 to \$15,000. Accordingly, each of Lee and Registrant A are directed to pay a fine of \$15,000.00 to RECO within ninety (90) days of their notification of this decision.

Summary

The Appeal from the Discipline Decision is hereby dismissed. That part of the Appeal relating to the Penalty Decision is hereby granted in part and the order of the Panel is to be varied to read as follows:

1. A. Bella Lee is ordered to pay a fine of \$15,000, payable to RECO within 90 days of notification of this Decision; and

B. Bella Lee is ordered to successfully complete the classroom courses “REIC 2600: Ethics and Business Practice” course and REIC 2280: Legal Issues in Real Estate” provided by the Real Estate Institute of Canada. Bella Lee is to provide RECO with confirmation of successful completion of these courses within 180 days of notification of this decision.

2. A. Registrant A is ordered to pay a fine of \$15,000, payable to RECO within 90 days of notification of this Decision; and

B. Registrant A is ordered to successfully complete the classroom courses “REIC 2600: Ethics and Business Practice” course and REIC 2280: Legal Issues in Real Estate” provided by the Real Estate Institute of Canada. Registrant A is to provide RECO with confirmation of successful completion of these courses within 180 days of notification of this decision.

Costs

If the parties cannot agree on costs—with the Appeal Panel noting that there was *divided* success on this appeal-- written submissions by each party not exceeding three (3) double-spaced pages may be filed with RECO within ten (10) days of the release and delivery of these Reasons. Thereafter, the Appeal Panel will advise the parties of its decision on costs.

[Decision Released: February 8, 2022]



Real Estate Council of Ontario

DISCIPLINE DECISION

**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:

REAL ESTATE COUNCIL OF ONTARIO

- AND -

BELLA LEE

The Panel held a teleconference on January 23, 2019 to discuss the written submissions with respect to Penalty and Costs. The Panel decided as follows:

ORDER:

Fine of \$25,000.00 payable to RECO within 90 days of sending this decision.

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

Successful completion by the Registrant of the “REIC 2280: Legal Issues in Real Estate” classroom course provided by the Real Estate Institute of Canada.

Provide RECO with confirmation of the successful completion of the classroom course within 180 days of sending this decision.

COSTS AND EXPENSES:

WRITTEN REASONS:

REASONS FOR DECISION

BELLA LEE (“Lee”) AND REGISTRANT A

PENALTY & COSTS

INTRODUCTION

The Panel met by teleconference on January 23, 2019, at 2:00 p.m. to review the written Submissions of the parties on the issues of penalty and costs. Submissions were received from all parties to this proceeding. The Panel confirms that neither party made any submissions with respect to costs.

PANEL'S DECISION ON PENALTY

In considering the appropriate penalty in this case, the Panel reviewed and considered the Decision of the RECO Appeals Committee in Suzette Thompson (May 31, 2012), and, in particular, the Panel reviewed the nine principles that are to govern the assessment of penalty.

1. The Nature and Gravity of the breaches of the Code of Ethics

In considering penalty, the Panel considered both Respondents' actions to be serious. At no point did either Respondent reveal to the other parties to the transaction that there was no other offer. As a result, the Respondents failed to treat everybody involved in this transaction fairly, honestly, and with integrity as per Section 3 of the Code of Ethics.

Both Respondents were aware that no second offer was made in the transaction related to this Complaint, and therefore they knowingly made inaccurate representations in respect to a trade in real estate contrary to Section 37 of the Code of Ethics.

Both Respondents participated in misleading the Complainant regarding a nonexistent offer and, as a result, both Lee and Registrant A failed to use their best efforts to prevent the misrepresentation and unethical practice as set out in Section 38 of the Code of Ethics. The Panel also found that the conduct of the Respondents could reasonably be regarded as disgraceful, dishonourable, unprofessional, and unbecoming a Registrant contrary to Section 39 of the Code of Ethics.

2. The role of the offending member(s) in the breaches.

Evidence provided at the Hearing established, and the Decision of the Discipline Panel found that the breaches which occurred at the offer presentation were solely the result of the decisions, actions, and omissions of both Lee and Registrant A.

3. Whether the offending member(s) suffered or gained as a result of the breaches.

The Respondents failed to tell the Complainant that this was not a multiple offer situation. This conduct on the part of the Respondents led to the Complainant increasing her Offer thereby leading to an increased commission for the Brokerage as well as for the Respondents.

4. The impact of the breaches on the Complainant and others.

As described above, the Complainant, not having been provided with the true facts, “bid against herself” and ended up paying more for the Property than may have otherwise been the case. The Complainant, according to her evidence at the Hearing, also suffered from depression and guilt as a result of this situation and lost twelve pounds.

5. The need for specific deterrence to protect the public, **and**

6. The need for general deterrence to protect the public.

The Respondents in their Submissions refer to “the length of time that the Respondents have been Registrants...” Considering this, it is most unfortunate that we find this conduct occurring. If anything, this makes it more important that these two Registrants get the clear message at this point that this type of conduct is not tolerated in the real estate profession. The fact that they disputed the charges and in their evidence suggested that they were not at fault in any way underlines the need for specific deterrence.

The Panel discussed at length the need for both specific and general deterrence. The amount of monetary penalty sought by the Registrar was significant and the Panel discussed this with regard to the fact that penalty cannot be the relative cost of doing business throughout the province. The Panel concluded that the sanction in this case should be severe both as specific and general deterrence in an effort to dissuade, not only the Respondents but all Registrants from engaging in similar disgraceful and unethical behaviour. The Panel concurred with the

Registrar that in this case, specific deterrence requires that the penalty should also include an educational component to remind the Respondents of their obligations and responsibilities as Registrants.

7. The need to maintain the public's confidence in the integrity of the profession.

All of the points made above are equally applicable to this principle. The Panel was mindful of this when reaching its conclusions on penalty. It is the Panel's hope that the sanctions and penalties imposed will help to maintain a positive public perception of the real estate industry.

8. The degree to which the breaches are regarded as being outside the range of acceptable conduct.

As stated above, these are not minor charges. The conduct is serious and well outside what would be considered acceptable conduct for a real estate professional.

9. The range of sanctions in similar cases.

When considering the range of sanctions in similar cases, the Panel reviewed the cases submitted by the Registrar, Amedola and Batson. The Panel considered the factual similarities and differences and also considered the time lapse since those cases were decided. There is no question that real estate prices throughout the province have significantly increased over the years and correspondingly commissions have also significantly increased. The Panel feels that, as a result, the penalties for breaches of the Code of Ethics should also significantly increase.

SANCTION SOUGHT

The Registrar initially sought a monetary penalty of \$50,000 from each Respondent together with an outlined educational component for each Respondent. Subsequently, because the breaches predated the increase in maximum fines from \$25,000 to \$50,000, the Registrar sought monetary penalties of \$25,000.00 from each Respondent together with the educational component. The Respondents, through their Representative suggested \$5,000 as an appropriate monetary penalty.

PENALTY

The sanctions available to the Panel include a maximum fine of \$25,000 and/or educational courses.

As described in the Reasons of this Panel on finding, the two Respondents acted jointly throughout the relevant period and by their own admissions they acted in partnership. Therefore the penalties imposed shall be the same for both Registrants.

1. A. Bella Lee is ordered to pay a fine of \$25,000, payable to RECO within 90 days of notification of this Decision; and

B. Bella Lee is ordered to successfully complete the classroom courses "REIC 2600: Ethics and Business Practice" course and "REIC 2280: Legal Issues in Real Estate" provided by the Real Estate Institute of Canada. Bella Lee is to provide RECO with confirmation of successful completion of these courses within 180 days of notification of this decision.

2. A. Registrant A is ordered to pay a fine of \$25,000, payable to RECO within 90 days of notification of this Decision; and

B. Registrant A is ordered to successfully complete the classroom courses "REIC 2600: Ethics and Business Practice" course and "REIC 2280: Legal Issues in Real Estate" provided by the Real Estate Institute of Canada. Registrant A is to provide RECO with confirmation of successful completion of these courses within 180 days of notification of this decision.

COSTS

As submissions for costs were not made by either party, the Panel directs that each party shall be responsible for its own costs in connection with this matter.

[Released: March 12, 2019]



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:

REAL ESTATE COUNCIL OF ONTARIO

- AND -

BELLA LEE

DISCIPLINE DECISION AND REASONS FOR DECISION

APPEARANCES:

For the Registrant:

Neil Gill

For the Real Estate Council of Ontario: George Drametu, counsel
Dipak Parmar, paralegal

Heard in Toronto:

April 3 and 4, 2018
July 23, 2018

FINDINGS:

In violation of Sections 3, 37, 38 and 39 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 Manager, Discipline & Appeals Hearings

COSTS AND EXPENSES: N/A

WRITTEN REASONS:

REASONS FOR DECISION

INTRODUCTION

This Hearing was held on April 3, 2018, April 4, 2018, and July 23, 2018, in the presence of the Respondents Registrant A and Bella Lee ("Lee"). Cameron Forbes represented Registrant A as agent and Neil Gill was legal counsel for Lee. George Drametu was counsel for the Real Estate Council of Ontario, and Dipak Parmar, paralegal for the Real Estate Council of Ontario. Nicolette Holovaci acted as independent legal counsel to the Discipline Panel.

ALLEGATIONS BY THE REGISTRAR, REBBA 2002

In its Allegation Statement the Registrar, *REBBA 2002* alleged that Lee and Registrant A acted unprofessionally as follows:

- Did not at any relevant times disclose and/or ensure that the Complainant or Representative B were aware that they were no longer in competition and its particulars, contrary to sections 3, 5, 38 and 39 of the Code of Ethics ("the Code");
- Did not at the earliest practicable opportunity inform the Complainant or Representative B that no other offers were presented to the sellers, contrary to sections 3, 5, 38 and 39 of the Code;
- Having regard to all circumstances, Lee and Registrant A knowingly made inaccurate representations in respect of a trade in real estate by failing to inform the Complainant and/Representative B that the First Potential Buyer withdrew their offer and that they were no longer in competition, contrary to section 37 of the Code;

- Having regard to all circumstances, Lee and Registrant A failed to use their best effort to prevent error, misrepresentation or any unethical practice, in respect of a trade in real estate as their conduct led the Complainant and her husband to increase their offer to \$3,000,000.00 with no conditions which was \$200,000.00 over their initial offer, contrary to section 38 of the Code, and;
- Having regard to all circumstance, both Lee and Registrant A acted in an dishonourable and unprofessional manner by advising the Complainant or Representative B of another offer that was non-conditional with a very good price, when they knew or ought to have known that no such offer existed and this is unbecoming a registrant, contrary to section 39 of the Code;

The Registrar, *REBBA 2002* alleged that Lee and Registrant A breached the following sections of the Code of Ethics:

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.

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.

37(1) – Inaccurate representations - A registrant shall not knowingly make an inaccurate representation in respect of a trade in real estate.

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.

39 – Unprofessional conduct, etc. - A registrant shall not, in the course of trading in real estate, engage in any act or omission that, having regard to all of the circumstances, would reasonably be regarded as disgraceful, dishonourable, unprofessional or unbecoming a registrant.

EXHIBITS

1. Allegation Statement dated April 11, 2017
2. Notice of Hearing dated February 13, 2018
3. RECO Book of Documents dated March 14, 2017 – For Identification Purpose Only
4. Email dated September 3, 2015
5. Text Message and Emails – Seller and Buyer A

WITNESSES FOR THE REGISTRAR, REBBA 2002

1. Buyer A
2. Representative B
3. Representative C

WITNESSES FOR THE RESPONDENT

1. Seller A
2. Lee
3. Registrant A

OPENING STATEMENT OF THE REGISTRAR, REBBA 2002

The Prosecutor directed the Panel to Exhibit 3, the Book of Documents, and in particular to the Allegation statement. He submitted that the Complainant was advised that they would be in a multiple offer situation and that there would be two rounds of negotiation. He stated that the Complainant had an offer drafted prior to attending at the selling broker's office, and that Complainant and her agent were advised that there was a full price offer in hand, and they should increase their offer. He said they increased their offer once and refused to raise it again and the irrevocable time on the offer was 11:59 p.m. on the night in question. He suggested that a phantom offer was allegedly made by the respondents to get an increase in the offer which had been presented. He submitted that this was in contravention of Sections 3, 5, 37, 38 and 39 as per tab 1 page 5 of Exhibit 3.

OPENING STATEMENT OF COUNSEL FOR LEE

In his opening remarks Mr. Gill, on behalf of Lee, stated the facts are not simple. He questioned the Complainant's credibility after almost 2 years. He submitted that the Complainant's recollection after this time should carry little weight.

OPENING STATEMENT OF AGENT FOR REGISTRANT A

In his opening remarks Mr. Forbes, on behalf of Registrant A, stated that there was no phantom offer; the parties met in the brokerage office; the sellers were present; two sets of Buyers were present, and two listing agents were present. He asked why this Complainant had not asked to back out of the transaction. He stated that nobody said there was another offer and, in fact, the Complainant presented a cheque and a bank draft the following day. He stated that there was a conflict between the evidence of the Complainant and that of her agent.

WITNESSES FOR THE REGISTRAR, REBBA 2002

RECO Witness – Buyer A

Prior to examination in chief of Buyer A the Prosecution introduced a motion to use an interpreter to interpret Mandarin to English and vice versa. Mr. Gill asked for a stipulation that the whole testimony of the witness should be through an interpreter, and not a combination of direct testimony and interpretation. The Prosecution and Mr. Forbes agreed with the stipulation and the interpreter was sworn.

The witness, through the interpreter, explained in response to questions from the Prosecution that she was at that time a full-time mother of three children and an artist and, in fact, at the relevant time, was preparing an art exhibition in China for September 3, 2015. She identified Tab 2 page 3 of Exhibit 3 as her letter of complaint.

When asked why she filed the complaint she explained that she had found this listing on MLS.ca and asked Representative B to book an appointment. The price was \$3.088 million, and she viewed the property on August 20, 2015. Her husband and one daughter were with her and her agent, Representative B. The sellers were home and she met them. She remembered having a discussion with the Seller regarding paintings, an interest they apparently had in common.

Buyer A explained that she loved the house and decided to make an offer after discussion with Representative B. She called Representative B to prepare the offer and they discussed price and comparables and decided to offer \$2.806 million, following Representative B's advice on comparables for the area. A deposit of 5% of the price was made to show her sincerity. She stated that she had been approved for a \$2 million mortgage and that she had a townhouse which could be sold.

Representative B informed Buyer A via text that the meeting would be at 7:00 p.m. in the listing agent's office on August 21, 2015. They met Representative B there. They met the listing agents there and she couldn't remember which of the listing agents actually directed them to the closing room. There Representative B produced the offer which he had prepared previously. They signed the offer for \$2.806 million and Representative B left the room.

Buyer A testified that Registrant A returned to the room to say that there would be two rounds to the offer presentation; the minimum offer was to be \$3 million; and that there was a full price offer of \$3.088 million with no conditions. She testified that at that point they didn't know that they had no chance. They were surprised when they were told that \$3 million was the minimum offer so they increased their offer and took out their conditions as per page 7 of Tab 4C of Exhibit 3.

She further testified that at that point her husband left the room and went downstairs; then Lee came in and said that the Seller will remove three lights in Schedule C if they don't improve the price. She thought something was wrong and when she went to look for her husband, he had started walking home. She tried to return to the office, but the door was locked, and they had difficulty getting in because it was after business hours. When they got in, the Seller hugged her and said, "don't panic dear the house is yours."

Buyer A testified that when she went to get her husband, she overheard people speaking in Mandarin to their agent and they were saying, "We are not making an offer".

Buyer A was asked if the listing agents told her there was no other offer and she testified she was never told there was no other offer.

Buyer A testified that Representative B had asked them for price increases, and they had said no that \$3 million was their limit. She was asked what effect the transaction has had on her, and she stated that, even though it was 2 1/2 years ago, it is still painful, and that now competing offers are common, but then it was unusual. She said that it hurts very much, she feels they were cheated and she suffered from depression and guilt. She said that she lost 12 pounds, and it was not until the 2016 March break, that she told herself to stop for the family and for her own sake she picked up her brush and painted. She said she understands now there is real competition. She felt there was no other offer that it was fraud; it was a lie. She said they could have said go home. Representative B said there was no other offer - no need to raise the price and to send

cheque to the listing office by noon for \$140,000.00. She called Representative B to ask if there was another offer and he said he would check with the RECO office.

She was asked if she had contact with the sellers after the fact. She said that she met the female Seller at Starbucks on September 1 and she asked if there had been a full price offer with no conditions and she said the seller seemed surprised. She said she was having difficulty with the mortgage and that the seller offered her the card of a Mortgage Specialist (Exhibit 5). She said the seller told her that she had one more house to sell and that she had tried to sell before, and she asked about Feng Shui.

Cross-examination by Mr. Forbes

On Mr. Forbes cross-examination, the witness testified that she was a professional painter and that she major majored in art, specifically in Chinese art, that she was college educated and that her husband is the CEO of a traveling company, and he is also educated. She testified that her English is conversationally okay, and the interpreter is for her comfort. She spoke to the two respondents in English and to Representative B in Mandarin; she understood conversation in English but not legal or technical terms.

Buyer A confirmed that the showing took place on August 21 with Representative B present, and the sellers were home and she met them. After the showing she had Representative B prepare the offer at about noon and he confirmed that they would be meeting at the Brokerage A office at 7:00 p.m. that evening for the offer presentation. Mr. Forbes asked if Registrant A came in. She replied they closed the door because they were going to sign the documents.

Representative B then left to present the offer and then he returned and waited in the room with them. A short time later Registrant A came back into the room and said they wanted a full price offer with no conditions at a minimum price of \$3 million.

Mr. Forbes stated that that made no sense if there was a full price offer on the table with no conditions and Buyer A testified that that's what made her suspicious. She was asked what Representative B suggested at this time. She said he discussed market value and that is where the \$2.86 million offer price came from. She was taken to Tab 3, page 3, paragraph 2 (Exhibit 3). Representative B had suggested the price be increased to \$3 million. Mr. Forbes asked how she was going to pay and she testified that she was going to get some help from relatives in China.

She was referred to paragraph 3 of her Complaint (Exhibit 3, Tab 2), that she was in that room without any water offered, with both listing agents rushing in and out, she could feel the pressure grow and it was getting bigger and bigger. Again, she was asked where the money was coming from. She said that she had a property to sell, and that the deal closed on the subject property. On August 24, she was told by one bank that she had no mortgage. The next bank said that they would give her the necessary amount, but her husband had to be in Canada to have the financing approved. On August 20, she went to another bank and got approval. She needed to compare offers on October 20 close on October 29.

The witness is referred to paragraph 4 on the second page of her Summary of Complaint (Exhibit 3, Tab 2) and asked what she did when she heard a woman's loud voice in the hallway saying "we not give offer" in Chinese. She answered, "I knew something was wrong for sure; I went to get my husband". After discussion with her husband Buyer A testified that they stated that the \$3 million offer should not be changed. At that point Buyer A also stated that the Seller is a real estate representative.

Buyer A was then referred to Tab 21 page 1 of Exhibit 3 and she testified that the amount indicated on that page for the deposit is correct and that she did not ask Representative B to submit his own cheque, but that he volunteered. Mr. Forbes then asked if she owned a townhouse in Toronto prior to buying this house. He asked if she used an agent. She answered "Yes" to both, in 2011. She said that she had bought the townhouse but she was not experienced in multiple offer situations and she had never won one.

Buyer A was asked where the offer was during the time that this discussion had gone on, and she said Representative B had submitted the offer and that the changes were made by Lee.

The witness was then referred to Tab "C" page 1 of Exhibit 3 and verified that the Offer was received at 7:30 p.m. and presented to the sellers at 8:00 p.m. and accepted at 9:30 p.m. but she didn't know who wrote it. The witness was excused.

RECO Witness – Representative C

The next witness, Representative C was sworn in. Representative C stated that he had been a registrant for seven years at the time in question. He was asked to explain his involvement and when he showed the subject property. He replied that in August of 2016 he had shown the

property. He had a long-term relationship with the Buyers because they had made two previous purchases with him. There was no Buyer Representation Agreement signed but they had expressed an interest in the property. He spoke to Lee and advised that he had a talk with his client, and his client was interested.

Lee called back and said there was going to be another offer and he explained to Lee that his clients were just starting to look, and he would talk to her later. The Offer was being presented later that evening at 7:00 p.m. He went to the Brokerage, but his clients were not totally ready. He was asked if he registered an offer and what his offer was, and he confirmed that he had not.

He was then referred to Tab 4 pages 1, 2 and 3 of Exhibit 3 and asked to recollect the details of his offer. He stated that his offer contained a longer closing date and was for \$2.960 million with conditions but had not been signed. He testified when he met with Lee, she told him the rules of the competition. He informed Lee that the clients were a couple, and the husband was keen to buy the house but the wife less so. He testified he couldn't remember exactly what Lee's rules for the offer presentation were, but he was informed that there was another offer. In reply to the question, if he made an offer and did, he have a copy of the offer, he had no copy. He testified he arrived at Brokerage A half an hour to 45 minutes early but gave nothing to Lee. He and his clients left together.

Cross-examination by Neil Gill

The witness confirmed that he was hoping for an offer, that he hadn't gotten anything signed and hadn't kept any of the paperwork. He had no knowledge of discussions amongst, and he didn't go into the room with the other Buyers or the Sellers.

Cross-examination by Cameron Forbes

Mr. Forbes referred the witness to Tab 4B, page 1 and page 3 of Exhibit 3 and questioned if he left the message for Lee at 5:59 p.m. on 21 August 2015. The witness said he couldn't remember. Mr. Forbes suggested that page 3 of the same Tab could not have happened if he had not sent the message.

The witness was then referred to Tab 16 of Exhibit 3 and he was questioned as to the paragraph stating that his customers were going to make a low-priced offer with conditions for \$2.95 million but that they were hesitant to sign it. Mr. Forbes questioned the use of the term low offer when it

was for \$2.95 million on a property listed for \$3.088 million. The witness replied that he considered that offer to be very low considering the offer contained conditions and, as he had already stated, a long closing date.

Mr. Forbes suggested that the buyers were allowed to withdraw without pressure. The witness answered that this was correct.

RECO Witness – Representative B

Representative B testified that he has been a full-time realtor since 2012 with Brokerage B. In 2015 he had introduced the Buyer to over 50 listings. In this particular case, she had been driving and saw the sign. He checked the property on MLS and on August 19 he called and set an appointment for the listing of the subject property, 1-A Street, City A, as identified on Tab 4A of Exhibit 3. When Buyer A saw the property, the Sellers were home.

Representative B testified that he called the listing agents to do an offer and he was not sure which one. He was referred to Tab 4C page 1, Exhibit 3, the Offer Summary Document, and he said that he had provided that document, showing the offer was received in person at 7:30 p.m. on August 21, 2015, and presented to the Sellers at 8:00 p.m. that evening. He was asked to identify the document at Tab 4C page 2 Exhibit 3 which he identified as the offer that he had prepared that evening.

The witness was asked how he arrived at that price, and he said it was based on comparables, and that the deposit was 5% of the selling price. He testified that he called the listing brokerage to register his offer, and that he was told to go to the office at 6:00 or 6:30 p.m., but that he didn't remember exactly what time he was told. At 5:30 to 6:15 p.m., he was told there would be a second offer, but he was not sure if it was by Lee or Registrant A who told them of this.

The Prosecution then referred the witness to Tab 20, pages 8 and 9, Exhibit 3, the text instructing him to be at the office at 7:00 p.m. at 2-A Street, Unit 1. When they arrived, Registrant A came and took them to a room to sit with the clients and have them sign the offer which he had prepared.

The witness testified that he had prepared an offer for \$2.806 million with the financing and inspection conditions. The listing broker, Registrant A informed he and his clients that the price was too low, and no conditions were allowed. Then Registrant A left and he spoke to his client

about raising the price to \$3 million with no conditions on financing. Registrant A came back and took the offer to the Seller, and it was irrevocable till 11:59 p.m. that evening. He testified that Registrant A came back (as per Tab 18 of Exhibit 3) and said the offer was not accepted. He said there was an offer of full price with no conditions. Then the listing representative came back and said his client's offer was accepted. He said it didn't feel right. He testified that Lee was writing Schedule C to the offer, which had previously been accepted. When he questioned the production of the Schedule C after the offer had been accepted, Lee informed him that, "we are here to sell property, not to please your clients."

He reiterated that his best recollection was that he did not hear the other person (possible buyer) say, as they were leaving, that they would not make an offer. He was asked if it was his understanding that his clients couldn't afford a \$3 million house and he testified that they had made an offer on a \$3.5 million house just before this house came on the market, and further they had not told him that they could not waive financing. He testified that the quality of this house was above the area value, and that he thought the other Buyers were still there until 9:30 when Buyer A came back and told him what she heard and saw. He was then referred to Tab 4C, pages 7 and 8, Exhibit 3, the Schedules to the Offer.

He testified that Schedules A and C on those pages were finalized after 9:30 p.m.

He was asked about the deposit cheque for \$140,000.00 which he provided to the listing brokerage. He testified that he told the listing agent and the sellers that the cheque was not valid, just a symbol of good faith. When asked if Buyer A was unhappy with him, he said he was not aware of that.

Cross-examination by Cameron Forbes

Mr. Forbes began by asking Representative B if his clients could get a mortgage, and he replied that they had and that the deal was closed. He was then referred to Tab 3, page 4 of Exhibit 3 specifically the paragraph regarding the woman's voice dramatically saying in Chinese "we are not give offer" and he testified that he did not hear that. He was then referred to Tab 21, page 3 and he testified that after they arrived, both listing representatives told them that there was another very good offer without conditions. About the last paragraph the witness was asked, who told him his Buyers' offer had been accepted. He answered that both listing agents came to the room and told them the offer had been accepted. Buyer A then went out to discuss with her husband and then brought her husband back to finalize the offer. The witness was then referred to Tab 18 of

Exhibit 3 and asked about the date on page 1 of that document and he identified it as May 10, 2016 at 12:01 p.m. He said that he was not sure of the exact words.

The witness was asked if he knew if listing agents were not allowed to tell other parties about offer details. He replied, "yes" he knew that. He was asked, if the listing agents know that. He replied that he didn't know if they knew that. He was asked if he gets a lot of business and he replied by stating that, "he's not much of a lister, he's more of a buyer agent".

Re-examination by the Prosecution

Representative B was asked if initials were applied to the offer after it was accepted, and he replied "yes". He said that Lee came in and he asked if there was a full price offer confirmed and she replied, "yes". He was referred to Tab 21 page 2, Exhibit 3 to the middle of the page in his response to RECO which stated that, after they arrived at the Listing agent's office they were informed of the rules for the offer presentation and that the Listing agents also indicated that another offer was non conditional with a very good price. He was then again referred to and acknowledged Tab 4C of Exhibit 3, which showed that the offer was received by the listing brokerage at 7:30 and presented to the sellers at 8:00 p.m. and was accepted by the sellers at 9:30 p.m.

The Prosecution retired and the defense called their first witness.

WITNESSES FOR THE RESPONDENT

Respondent's Witness – Seller A

Seller A, the Seller of the subject property testified that he was by profession, an Architect and that he had previously done business with Registrant A. He was referred to Tab 4 of Exhibit 3 which he identified as the listing for his property, and he confirmed that the property was listed for \$3.088 million. He testified that the listing representatives called and said they had two offers.

The witness testified that he had informed Registrant A that he would not sell for less than \$3.08 million, that he did not have to sell, and that he could get more money for the house now. He explained that his wife talked to Buyer A after August 21 of that year. He didn't know if the Buyer was unhappy.

Cross-examination

Mr. Gill did not cross-examine this witness.

Under cross-examination by Mr. Forbes, the Seller testified that there were two offers, but he hadn't seen the offers; he was only verbally advised. He remembered his wife talking about meeting the Seller at a coffee shop and that she gave Buyer A a Mortgage Broker's card, and they discussed the husband's health. He testified he had no recollection of the \$2.95 million offer. He was asked what time he went to the office, and he said he didn't remember. He was referred to Tab 4C of Exhibit 3 and identified that the offer was presented at 8:00 p.m. by both respondents, and he has no idea what was said.

There was no re-examination of the witness, and he was excused.

Respondent's Witness - Lee

Lee took the stand and testified that on August 21 Representative B called to confirm an offer, so she called the Seller to notify them of the offer and they established 7:00 p.m. at their office as the offer presentation time.

Later in the afternoon Representative C called to register an offer so she could advise all agents who had or would be showing the property. She said that she and her partner were already at the office. Throughout her testimony, she referred to Registrant A as her "partner". She said Registrant A was in charge of negotiations and Lee was in charge of drafting Schedule C. At one point Registrant A came back and told Lee that the second Buyer had just left. She testified that the seller was difficult and after they had reviewed the offer Registrant A went back to see the Sellers and she went to the closing room to tell Representative B. Lee testified that there were no offers and that the second buyer had left at 8:40 p.m. She said that she had advised the client that two people were bringing offers.

Cross-examination

On cross-examination, Lee testified that she told the client there were two offers, although she did not get an actual offer from Representative C. She was referred to Tab 4C of Exhibit 3 and confirmed that Representative C and his clients left between 7:30 p.m. and 7:50 p.m.

She was asked why the Seller said he hadn't seen the offer on paper, and she replied that she gave the offer to the Seller after Registrant A had verbalized the offer with the Seller.

Lee said that she has been in the business for nineteen years and at that particular time she had been in for fifteen years. She is now incorporated in Brokerage A. She admitted that the only written offer was from Representative B. She was asked why they didn't sign back the offer and she replied that she didn't know. She said that Representative B had advised his Buyers regarding the price of \$2.806 million, and the Sellers were waiting for Representative C to present his offer. Lee was providing feedback for the clients on previous showings. She confessed that she did not see a written offer until after Representative C's clients had left. She was then referred to Tab 4, page 3 items 5 and 6 of Exhibit 3 wherein she had admitted that she advised the Buyers Agents to bring the deposit cheques along with the offer as it had become a multiple offer presentation.

Directed to Tab 4, page 4, item 8 of Exhibit 3, she was asked why at that time she had replied to RECO she said "Prior to collecting final offers in writing, the listing brokers gave both Buyer Agents opportunity to work on their best offers". Lee couldn't remember.

On re-examination the witness was asked if she was told there were two offers, and she replied only Representative B made an offer.

Respondent's Witness – Registrant A

The Hearing reconvened on July 23, 2018, and the first witness called was Registrant A.

Registrant A testified that she had been registered since 2002 and she was working at Brokerage A. She said that she and Lee were partners and that their strong suit was they truly believed in face-to-face negotiations. Two people had registered offers, and everybody was apprised of the situation by e-mail and text. She was asked if she had said to anybody that there was a full price offer and she replied, "definitely not". She questioned "Why would we take \$3 million if we had a full price offer for \$3.088 million?" She agreed that agents should not register an offer unless they have it in writing. Everybody spoke English well and everybody was told not to offer less than \$3 million. She noted that the parties had experienced buyer agents.

Cross-examination

Registrant A testified that she had transferred to Brokerage B approximately 10 months after this transaction. She was referred to Tab 4A of Exhibit 3, which she identified as the listing from August 2015. She was asked how much interest there was in the property, and she said that there was fair interest. She was asked how many offers they got, and she replied one offer, two registered, one showed up and one buyer left.

Registrant A was referred to Tab 4, pages 3, paragraph 6 of Exhibit 3 which she identified as the response by herself and Lee to RECO. She was asked what time they came in and she said between 6:00 and 7:00 p.m. She confirmed that the Seller was there, and the Seller had told them, the listing agents, have two rounds of offers. They received one written offer from Representative B. Both parties were in the office and the offer was prepared at 7:30 and presented at 8:00 p.m. as per Tab 4C of Exhibit 3.

The witness was referred to Tab 12 paragraph 2 of Exhibit 3. Prior to the offer being accepted, she said that the Buyers agent was notified that they were not competing with any other offer. The second potential offer had given notice that they were not going forward. She testified that at all times, before the offer was accepted, the Buyer, through her realtor, knew that she was not competing with another offer.

During further negotiation, the sellers were convinced to accept the final offer of \$3 million".

The witness was excused.

SUBMISSIONS FOR THE REGISTRAR, REBBA 2002

It was the Prosecution's submissions that the buyers were interested in this property and made an offer as per Tab 4C, page 2 of Exhibit 3. The offer was for \$2.86 million. When they presented that offer, they were advised that there was a full price offer already on the table and that there would be two rounds of price negotiation. They increased their offer price to \$3 million, and when that was presented, they were advised that with \$3 million, they could lose some chattels, namely some chandeliers. When the Complainant stepped out of the room, she heard a person say in Mandarin that they were not making an offer. When she returned to the room, she was advised of the success of her \$3 million offer. Their Selling Agent confirmed this.

The Prosecution further submitted that Tab 21, pages 1, 2 and 3 of Exhibit 3 confirmed the buyers' story, as did the e-mail at Tab 22 of Exhibit 3. Representative C testified that he and his clients did not make an offer. The Buyers were misled, otherwise, how did the Sellers know how much the Phantom offer would be? Both the respondents were present, and both met all parties to this transaction. The Complainant and their selling agent both told the same story, and Representative C confirmed it.

The Prosecution submitted that Lee's testimony was full of contradictions, Registrant A's evidence was evasive, and the evidence of both was contradictory to the written response they gave to the Complaint dated September 22, 2015.

In conclusion, the Prosecution submitted that the allegations in the Allegation Statement were proven, and when the respondents did not inform the selling agent of the true facts, and were dishonest to the buyers, they were in contravention of sections 3, 5, 37, 38 and 39 of the Code of Ethics.

SUBMISSIONS FOR THE RESPONDENTS

Submissions for Lee

In submissions on behalf of Lee, Mr. Gill submitted that section 5 of the Code of Ethics has no application here. He questioned if the respondents did mislead? He submitted that there was uncontested evidence that everybody involved renegotiated after the other buyers left and then discussion took place on chattels. He stated that Representative B was not acting in his client's best interests and that she was very angry with him.

He suggested that Representative B was in a position that he had to support his client and he therefore framed his evidence in the best possible light for her.

Representative B had shown them 50 properties. When he showed up at the office, he was aware of other people and, after the second presentation, Lee came back in to discuss chattels. Representative B did not admit hearing the Mandarin comment by the other buyers about not making an offer. Mr. Gill said in reference to their arrival at the building both parties showed up between 7:00 pm and 8:00 pm, that the Seller wanted the full asking price and that Ms. Lee was

with the Seller and Registrant A was with the Buyers back and forth. He stated that Registrant A was not evasive.

He summed up in his final submissions that there was no evidence of misrepresentation. He submitted that there was some dissatisfaction with the complainant's sales representative. In her words "he sold us out for his personal gain". He submitted that this matter should not have come this far, and that Lee did not misrepresent anything.

Submissions from Registrant A

In submissions on behalf of Registrant A, Mr. Forbes said he would focus on three main areas, the Phantom offer, the reliability of the evidence of the Complainant, and the evidence of her sales agent. He stated that Registrant A was representing the seller, and the seller was not going to sell for less than \$3 million. He said that would not be how you manipulate somebody. He asked why somebody would have submitted a \$3 million offer if they were already informed that an offer at \$3.088 million was on the table. He said that the buyers clearly had the money to buy the house so why did the selling agent give a worthless deposit cheque to the listing agents when the draft was going to be delivered the next day.

It was Mr. Forbes contention that Tab 17 of Exhibit 3 was a huge mistake on behalf of RECO. He submitted that you can't rely on the written evidence provided by the selling agent Representative B when he was provided with a copy of the letter of complaint by RECO. He said that Representative B knew there was no other offer, he knew that Schedule C was added after the fact, and he was just there to support his client.

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.

FINDINGS BY THE PANEL

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

In deliberations, the Panel first took into consideration Mr. Gill's contention that section 5 of the Code of Ethics did not apply to this case. Section 5 reads as follows:

“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.”

The Panel considered the section and the specific wording and concurred with Mr. Gill. The language of Section 5 addresses the obligations of a registrant to the registrant’s clients and customers. There are no allegations in the Allegation Statement that address the service provided by the respondents to their clients or customers and as such, Section 5 of the Code of Ethics does not apply in this case, and it will be removed from this deliberation.

Next the panel considered Mr. Forbes contention that Tab 17 of Exhibit 3 was “a huge mistake on behalf of RECO”. Mr. Forbes suggested that providing a copy of the Complaint to Representative B was inappropriate and gave him an opportunity to tailor his evidence.

The Panel considered this matter and determined that it is standard procedure which is appropriate and reasonable during the investigation process to provide details of the Complaint to potential witnesses. In order to provide relevant evidence, a witness must be apprised of the matters at issue. This can be very helpful to trigger memories of the specific parts of a transaction or fact situation being considered and, indeed, ensures that a witness provides full and complete evidence which addresses what is relevant in the circumstances. In any event, there was no evidence led by any party to suggest that Representative B’s evidence was in any way tainted.

In regards to Sections 3, 37, 38 and 39 of the Code of Ethics, the Panel finds both respondents in breach.

The Panel finds no reason to doubt the credibility of the evidence of the Complainant or the evidence of Representative B and accepts that evidence which establishes that they were told that this was a multiple offer situation. Neither witness had any reason to fabricate their evidence.

Tab 4, pages 3 and 4 of Exhibit 3 was submitted to RECO by both agents in response to the Complaint. The document was prepared on September 22, 2015, very close in time to the relevant events and it was put to the witnesses during the Hearing. In that document, signed by each of them, which purports to be their own recollection, they claimed to have had two offers and state that there was a multiple offer situation. They admit that they shared in communicating that information to the Buyer and the Buyer representative. The evidence shows that there was never more than one offer. The evidence of Representative C confirmed this. The Respondents in their evidence did not dispute that this was the case.

During their evidence at the Hearing, both Respondents repeatedly said they were acting in partnership with the other. They were both on the listing, both worked on the transaction, and were both to receive commissions on any sale. By reason of their conduct, the offer presentation proceeded with the Complainant and her agent understanding that they were in competition with another prospective buyer in a multiple offer situation. The Panel finds that two agents, with the experience of the two Respondents, had they not been creating an impression of multiple offers, would have simply signed back the first offer from the Complainant with the sellers best price and the chattels listed, and let the buyers make a decision based on that with no pressure. The Respondents did not treat every person in this transaction fairly, honestly, and with integrity. Being fully aware that there were no other offers tabled, the Respondents knowingly made inaccurate representations in respect of a trade in real estate. They did not use best efforts to prevent error or misrepresentation. Finally, the conduct of these Respondents is reasonably regarded as disgraceful, dishonourable, unprofessional, and unbecoming a registrant.

As a result, the Panel finds both Respondents in breach of Sections 3, 37, 38 and 39 of the Code of Ethics.

PENALTY

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*.

If appropriate, submissions to be made on costs and expenses with submissions on penalty.

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

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

[Released: October 25, 2018]