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September 18 2004

Real estate agent fined for overlooking survey

Shows purchasers what they are and aren't getting

Most important document next to the deed

There seems to be a general misconception in the real estate field that a survey is not necessary when buying a freehold property because the lack of a survey can be covered off with title insurance.

"Why bother with a survey?" agents ask me. "You're getting title insurance aren't you?"

This attitude has become so prevalent that property sellers often do not bother checking their files to look up the survey they received when purchasing property.

All this may change soon in light of a decision of a discipline panel of the Real Estate Council of Ontario, the licensing body of real estate agents. The decision was issued in July, 2003, although its publication was withheld for 11 months without explanation.

The real estate agent was acting for the buyers and sellers of a property. In the transaction, he was a dual agent, which means that he owed a very high duty and responsibility to both parties.

On June 15, 2001, his buyer clients submitted an offer for the property. Unfortunately, the agent failed to disclose in writing to the buyers the significance of his role as dual agent before the preparation and signing of the offer.

Acting as listing agent for the sellers, he had prepared a listing showing the lot size of the property as 50 feet by 147 feet, with a private driveway.

He knew that the driveway portion of the lot had been expropriated by the Ontario Ministry of Transportation and that a highway was likely to be cut into the property.

This information was not disclosed on the listing and not mentioned on the offer the agent had prepared.

According to the real estate council's decision, the agent failed to advise the buyers to seek outside professional advice from a lawyer or a surveyor before signing.

The buyers asked to examine the survey that was available according to the listing. It was provided to them before they submitted their offer but it was not explained that the driveway belonged to the transportation ministry.

The agreement of purchase and sale was not made conditional on approval of the survey. In fact, the survey was not mentioned at all in the offer.

After closing, the transportation ministry blocked the driveway and began to park vehicles on it.

A ministry employee informed the surprised new owners that the ministry had purchased the driveway from the previous owners.

Unfortunately, it appears that the buyer's lawyer also failed to explain to them the difference between the land they were getting in their deed and what the survey showed. He or she also failed to tell them that part of the land had been expropriated.

Eventually, the title insurance company paid to rebuild the driveway on the opposite side of the property. To do so, it was necessary to remove a number of trees that had provided shade and privacy.

It is not clear whether the insurer provided compensation for the reduction in the lot size due to the loss of

the driveway land.

The buyers complained to the Real Estate Council of Ontario, and charges were brought against the agent.

At the hearing, the agent acknowledged that he acted in an unprofessional manner.

Among other things, he admitted to: failing to explain dual agency; failing to obtain a signed acknowledgement; failing to make the offer conditional on approval of the survey and; failing to advise the buyers to have an expert review the survey if he was not able to do so.

The real estate council ordered the agent to pay $4,350 for an administrative penalty and costs.

What is a survey and why is it so important? In everyday terms, a survey resembles a one-dimensional, overhead line drawing of a piece of real estate. It shows the measurements, corners, and boundaries of the land.

It is prepared by an Ontario Land Surveyor using calculations taken on the ground and compared with the registered titles of the properties.

It reveals the location of the buildings on the land in relation to the lot lines, and usually shows improvements such as fences, hedges, pools, overhead wires, easements and rights-of-way in favour of neighbouring owners or utility companies.

A survey shows what the buyers are getting, and more significantly, what they are not getting. Aside from the deed, the survey is in my view the most important document in a real estate transaction.

In its decision in this case, the real estate council's discipline panel has stated loudly and clearly that it may well be misconduct for an agent to fail to provide a survey to the purchasers before the offer is prepared. It may also be misconduct for an agent to fail to allow the purchasers to have a survey explained to them if the agent is not capable of doing so.

The decision is available on the real estate council's website at

http://www.reco.on.ca/publicdocs/20030729_3779.pdf

It is also reproduced below.

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

RICHARD LOWES

Respondent

DATE OF DECISION: July 29, 2003

FINDINGS: In violation of Rules 1(1), 1(2), 2, 3, 4, 6, 11, 21 & 42 of the RECO Code of Ethics.

PENALTY: Administrative Penalty of $3000 payable to RECO within 30 days of sending this decision.

COSTS AND EXPENSES: Costs of $ 1350 to be paid within 30 days of sending this decision.

REASONS FOR DECISION
This case came before this panel of the Discipline Committee of the Real Estate Council of Ontario (RECO) on an agreed statement of facts, and a recommendation with respect to penalty. After hearing the submissions of counsel for the Manager of Complaints, Compliance and Discipline (CCD) and also reading the materials supplied, we are in agreement that the recommended penalty should be accepted.

What follows is the agreed statement of facts that led to the penalty, as recommended by the parties, of $3,000 payable within 60 days of this decision and costs in the amount of $1,350 within 30 days of this decision.

Mr. Rick Lowes (Lowes) is a member of RECO and a salesperson registered under the Real Estate Business and Brokers Act, R.S.O. 1990, c. R.4 (REBBA).

Seller Broker is a member of RECO and registered as a broker under REBBA. At all relevant times of the transaction, Lowes was employed as a salesperson at Seller Broker.

Lowes, acting as a dual agent for the buyers, Buyer A and Buyer B (the Buyers) submitted an offer on June 15, 2001 on a MLS listing for a residential property municipally known as 1 A Street, owned by Seller A and Seller B. The Buyers were first time homebuyers.

Initially, Buyer Representative A and Buyer Representative B (Buyer Representatives) were the sales representatives on the file. However, the Buyer Representatives went on holidays and Lowes volunteered to take over and put the deal together. At this point, Lowes failed to explain his role in the transaction and/or dual agency and get an acknowledgement from the Buyers of his role. Lowes also failed to adequately disclose in writing his role as a dual agent in the transaction prior to the Agreement of Purchase and Sale being submitted or obtain a representation agreement.

Lowes failed to indicate on the MLS listing that the driveway evident at the property drive belonged to the Ministry of Transportation (MTO). The listing stated that the lot size for 1 A Street was 147 ft and 50 ft and that it had a private drive. Lowes, as the listing agent salesperson, knew from the time of listing the property that the lands had been expropriated and that the driveway was not part of the house, however this was not documented on the MLS listing. Lowes asserts that he discussed with the Buyers that a highway was likely to cut into the property. This was not put in writing either in the offer or separately documented. The Buyers assert that they were not informed of this.

Furthermore, the Property Data Entry Sheet of the Listing, dated October 5, 2000, failed to specify that driveway belonged to MTO. There were no schedules or separate documentation anywhere to state that the driveway belonged to MTO nor was there anything in the offer to suggest this.

In addition, the Seller Property Information Statement (SPIS) was not completed.

Lowes failed to advise the Buyers to seek outside professional advice such as a lawyer or a surveyor. The Buyers requested to examine the survey that was available according to the listing. The survey was provided to the Buyers before they submitted an offer but it was not explained to them that the driveway belonged to MTO. The Agreement of Purchase and Sale was not made conditional on approval of the survey. In fact, the survey was not mentioned at all in the offer.

After sale and possession of 1 A Street, the Buyers noticed that MTO put a curb in front of the driveway entrance preventing access to their driveway. In addition, there were MTO vehicles on their driveway. The Buyers requested that the vehicles be moved. Shortly after, an employee at MTO informed the Buyers that the previous owner had sold them the driveway. The Buyers attended the Seller Broker office and complained about the difficulties they were experiencing with their driveway. At this point, Lowes advised the Buyers to seek legal advice. The Buyers obtained title insurance that paid for a new driveway on the side of the house where trees once stood. The trees provided privacy for the Buyers from the highway.

Accordingly:
Lowes acted in an unprofessional manner:
- Failing to explain dual agency and get an acknowledgement prior to the Agreement of Purchase and Sale being submitted
- Failing to get confirmation of representation in writing from the parties
- Failing to make the offer conditional on the approval of the survey
- Failing to have the SPIS attached to the offer
- Failing to advise the buyers to have an expert review the survey if he was not capable

And thereby breached the following rules in the Code of Ethics: 1(1),1(2),2,3,4,6,11,21 and 42.

Based on the above agreed facts, and the fact that the parties have made a joint recommendation regarding the penalty, this panel accepts the agreed upon joint submission as to penalty.
