

IN THE MATTER OF The Real Estate Act, S.A. 1996, c.R- 4.5

**AND IN THE MATTER OF GARY KIRKHAM, Designated Representative of
Devonshire Realty Inc. o/a Sutton Group Devonshire Realty Inc.**

INTRODUCTION

1. The Executive Director of the Real Estate Council of Alberta conducted an investigation into whether the conduct of Gary Kirkham, Designated Representative of Sutton Group Devonshire Realty Inc., is deserving of sanction and/or whether he breached the requirements of the Real Estate Act or the Rules prescribed pursuant thereto.
2. The Executive Director and Gary Kirkham agree to resolve all matters against Gary Kirkham on the terms and conditions set out herein.

AGREED STATEMENT OF FACTS

3. Gary Kirkham has been an industry member since 1986. Mr. Kirkham worked for Spencer Real Estate as a salesperson from July 1987 to November 1987, then moved to Metro City Realty where he worked as a salesperson from November 1987 to May 1991. Mr. Kirkham subsequently worked as a salesperson at Re/Max Real Estate from May 1991 to June 1993 and then at Sutton Group (Jackson Young Realty) from June 1993 to October 1993 as a salesperson. On October 29, 1993 Mr. Kirkham became the Designated Representative of Devonshire Realty Inc. where he remains to date.
4. J.R. was employed as a salesperson at Sutton Group Devonshire Realty from December 1995 until April 15th, 1999.

The F.'s Complaint

5. S.F. was attempting to sell his home at 10324-21 Ave. Edmonton Alberta when he was approached by J.R. J.R. enticed him to list his property with the promise he would discount the commission. The verbally agreed commission rate was 3 and ½ percent.
6. J.R. agreed to list S.F.'s house at \$134,800 promising him \$130,000 in his pocket.

7. On August 8, 1996 the house sold for \$134,000. J.R. instructed the F.'s to pay his employer, Sutton Group-Devonshire Realty Inc., the full commission. J.R. told S.F. he would advise S.F.'s lawyer to give S.F. \$130,000 as agreed and to send the balance of \$4,000 to J.R.
8. S.F.'s lawyer did not receive any such direction. The total commission of over \$8,000 was paid to the agency. J.R. told S.F. he would give S.F. a personal cheque for the difference of \$4,581.40 later.
9. J.R. issued a cheque (#013, Canada Trust) on September 17, 1996 made payable to S.F. and R.F. in the amount of \$4,581.40.
10. S.F. deposited the cheque into his bank account and it was returned NSF. S.F. contacted Mr. Kirkham who stated that he could not do anything for him.
11. Mr. Kirkham spoke with J.R. regarding the cheque he issued to the F.'s. J.R. told Mr. Kirkham that he wrote the cheque but it was never intended to be cashed. It was a listing 'gimmick' and if the client was not satisfied with J.R.'s services he would refund the commissions. This did not happen.
12. The cheque was not dated at the time of listing, rather after the sale had closed.
13. Mr. Kirkham did nothing further to investigate or resolve this matter on behalf of the F.'s

The P.'s Complaint

14. J.R. represented a couple by the name of R.P. and J.P. [(the "P.'s")] J.R. agreed to sell their property for no commissions.
15. The property was jointly owned by the P.'s. Only J.P. signed the listing contract.
16. When the property was finally sold, full commissions were deducted and paid to J.R.
17. On September 26, 1996 J.R. issued a cheque to R.P. and J.P. in the amount of \$4,200.00. This amount reflected half of the commissions that were payable on the transaction. This cheque was made out after the sale had closed, not at the time of listing.
18. On October 1, 1996, the cheque was deposited into the P.'s account and on October 7, 1996 the cheque was returned NSF.

19. The P.'s attempted to contact J.R. by telephone with no success. They attempted to contact Mr. Gary Kirkham as well but he did not return their calls.
20. R.P. ultimately spoke to Mr. Gary Kirkham who stated that his agency was not responsible for any complaints against J.R. in regard to any unfulfilled unwritten side deals.
21. Mr. Kirkham also advised R.P. that his agency is not responsible for the conduct of their contracted agents and that if R.P. had a problem he should take care of it through the Courts.
22. Mr. Kirkham has an office policy that requires that a Land Titles search be obtained on every transaction. This is for the purpose of ensuring that every property listed for sale has the agreement of all owners. Mr. Kirkham provides no explanation as to why R.P.'s signature was not obtained on the listing agreement.
23. Mr. Kirkham has a policy that any renegotiations of commissions must be done in writing. This policy has been discussed at meetings and included in memos to the salespersons. Mr. Kirkham states his agency abides by what is written on the listing agreement as opposed to any verbal agreements.
24. Mr. Kirkham received complaints about "commissions rebates" and NSF cheques that J.R. provided from a number of clients including the P.'s, M.H. and M.K. Mr. Kirkham states that this was a personal issue for the salesperson.
25. Mr. Kirkham spoke to J.R. J.R. stated that the cheques or rebate promises were part of a marketing gimmick. J.R. promised clients to refund the commission if the vendor was in any way dissatisfied. This was J.R.'s explanation as to why the cheques were issued.
26. Mr. Kirkham told J.P. that Sutton Group was not responsible for the conduct of their contracted agents.

M.H.'s ***Complaint***

27. M.H. listed her property at 10320-21 Ave. Edmonton, Alberta with J.R. on August 13, 1996 for \$129,500. The property was co-listed by L.A. The listing contract provided for 7% commissions on the first \$100,000 and 3% on the balance.
28. J.R. told her he would charge her 5% commission and would give her the difference out of his own pocket.

29. The property sold on August 25, 1996 for \$126,900 by L.A.
30. Full commissions were paid by M.H. . No monies were paid to her by J.R.
31. M.H. spoke to Mr. Kirkham who told her there was nothing he could do, as there was nothing on the contract indicating 5% commission. Mr. Kirkham advised he would talk to J.R. . M.H. heard nothing further from either of them.
32. Mr. Kirkham spoke to J.R. in regards to M.H.'s complaint. J.R. told Mr. Kirkham that the allegations were untrue. J.R. stated that he never promised to rebate a portion of the commissions to M.H.
33. M.H. is out of pocket \$1,572.90.
34. By reason of the matters described herein, Gary Kirkham's conduct is deserving of sanction in that:
 - (a) he breached Rule 8(7)(b) by failing to ensure that the agency's business was carried on in accordance with the Real Estate Act. Gary Kirkham was aware of serious issues in regards to J.R.'s conduct which was contrary to the Real Estate Act but he failed to adequately supervise J.R. and he failed to act upon his knowledge. This was to the detriment of the public and the integrity of the industry.
 - (b) he breached his fiduciary duties to his clients by failing to act in their best interests when he did not act reasonably in regards to their concerns.
 - (c) he further breached section 25(9) of the Real Estate Act and Rule 33 by failing to keep copies of collapsed transactions.

SETTLEMENT TERMS

35. In settlement of these issues, Gary Kirkham will pay a fine in the amount of \$5,000 immediately to the Real Estate Council of Alberta.
36. Gary Kirkham agrees that as a condition of his authorization to trade in real estate, he will successfully complete the "Reducing Risk in Your Real Estate Office" and the "Real Estate Brokerage" courses within 6 months of ratification of this Consent Agreement.
37. Costs of this matter are in the amount of \$500 and are payable immediately to the Real Estate Council of Alberta.

38. Gary Kirkham acknowledges that he has been given an opportunity to seek the advice of legal counsel and acknowledges that he is agreeing to the terms of settlement of his own free will.
39. Gary Kirkham is aware that a copy of the Consent Agreement will be placed on his file and may be reviewed and considered in any future disciplinary proceedings.
40. Gary Kirkham is aware the Real Estate Council of Alberta may publish the contents of this Consent Agreement.
41. Gary Kirkham hereby waives any rights he may have under the Act or otherwise to a review, hearing, appeal or other judicial proceeding involving the matter referred to herein.
42. These settlement terms are intended to resolve all matters described herein and subject to the approval of the Hearing Panel, the Executive Director will take no further action under the Act or before the courts in this regard.

IN WITNESS WHEREOF the undersigned agree and accept the terms and conditions of this settlement this 18. day of August, 1999.

Signed and delivered
in the presence of

Signature

Witness to the signature
of Gary Kirkham

"Gary Kirkham"

GARY KIRKHAM

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

Real Estate Council of Alberta


"J.P."

Witness to the signature
of Bob Myroniuk

Per. "Bob Myroniuk"

Bob Myroniuk
Executive Director

Recommendation Approved
Recommendation Denied



DATED at the City of Calgary, in the Province of Alberta this 8 day
of September, 1999.

Real Estate Council of Alberta

Per. "Barry Gogal"

Hearing Panel Chairperson